Information on the Court of Justice of the European Communities

1977 – III

INFORMATION ON THE COURT OF JUSTICE

OF THE

EUROPEAN COMMUNITIES

No. III

1977

Information Office, Court of Justice of the European Communities,
B.P. 1406, Luxembourg.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

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C O N T E N T S

INFORMATION ON THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

Complete list of publications giving information on the Court:

I - Information on current cases (for general use)

1. Hearings of the Court

The calendar of public hearings is drawn up each week. It is sometimes necessary to alter it subsequently; it is therefore only a guide. This calendar may be obtained free of charge on request from the Court Registry. In French.

2. Judgments and opinions of Advocates-General

Photocopies of these documents are sent to the parties and may be obtained on request by other interested persons, after they have been read and distributed at the public hearing. Free of charge. Requests for judgments should be made to the Registry. Opinions of the Advocates-General may be obtained from the Press and Information Branch. As from 1972 the London Times carries articles under the heading "European Law Reports" covering the more important cases in which the Court has given judgment.

II - Technical information and documentation

A - Publications of the Court of Justice of the European Communities

1. Reports of Cases before the Court

The Reports of Cases before the Court are the only authentic source for citations of judgments of the Court of Justice.

The volumes for the years 1954 to 1972 are published in Dutch, French, German and Italian; the volumes for 1973 onwards are also published in English and in Danish. An English edition of the volumes for 1954-72 will be completed by the end of 1978. The Danish edition of the volumes for 1954-72 will be available by the end of 1977.

2. Legal publications on European integration (Bibliography)

New edition in 1966 and supplements.

3. Bibliography of European case-law

Concerning judicial decisions relating to the Treaties establishing the European Communities. 1965 edition with supplements.

4. Selected instruments on the organization, jurisdiction and procedures of the Court

1975 edition.

These publications are on sale at, and may be ordered from:

l'OFFICE DES PUBLICATIONS DES COMMUNAUTÉS EUROPÉENNES,
Rue du Commerce, Case Postale 1003, Luxembourg.

and from the following addresses:

Belgium:	Ets. Emile Bruylant, Rue de la Régence 67, 1000 BRUSSELS
Denmark:	J. H. Schultz' Boghandel, Møndergade 19, 1116 COPENHAGEN K
France:	Editions A. Pedone, 13, Rue Soufflot, 75005 PARIS
Germany:	Carl Heymann's Verlag, Gereonstrasse 18-32, 5000 KOLN 1
Ireland:	Messrs. Greene & Co., Booksellers, 16, Clare Street, DUBLIN 2
Italy:	Casa Editrice Dott. A. Milani, Via Jappelli 5, 35100 PADUA M. 64194
Luxembourg:	Office des publications officielles des Communautés européennes, Case Postale 1003, LUXEMBOURG
Netherlands:	NV Martinus Nijhoff, Lange Voorhout 9, 's GRAVENHAGE
United Kingdom:	Sweet & Maxwell, Spon (Booksellers) Limited, North Way, ANDOVER, HANTS, SP10 5BE

Other Countries: Office des publications officielles des Communautés européennes,
Case Postale 1003,
LUXEMBOURG

B - Publications issued by the Press and Legal Information service of the Court of Justice

1. Proceedings of the Court of Justice of the European Communities

Weekly summary of the proceedings of the Court published in the six official languages of the Community. Free of charge. Available from the Press and Information Branch; please indicate language required.

2. Information on the Court of Justice

Quarterly bulletin containing the heading and a short summary of the more important cases brought before the Court of Justice and before national courts.

3. Annual synopsis of the work of the Court of Justice

Annual booklet containing a summary of the work of the Court of Justice covering both cases decided and associated work (seminars for judges, visits, study groups, etc.).

4. General booklet of information on the Court of Justice

These four documents are published in the six official languages of the Community while the general booklet is also published in Spanish and Gaelic. They may be ordered from the information offices of the European Communities at the addresses given above. They may also be obtained from the Information Service of the Court of Justice, B.P. 1406, Luxembourg.

C - Compendium of case-law relating to the Treaties establishing the European Communities

Répertoire de la jurisprudence relative aux traités instituant les Communautés européennes

Europäische Rechtsprechung

Extracts from cases relating to the Treaties establishing the European Communities published in German and French. Extracts from national judgments are also published in the original language.

The German and French editions are available from:

Carl Heymann's Verlag,
Gereonstrasse 18-32,
D 5000 KÖLN 1,
Federal Republic of Germany.

As from 1973 an English edition has been added to the complete French and German editions. The first two volumes of the English series are on sale from:

ELSEVIER - North Holland -
Excerpta Medica,
P.O. Box 211,
AMSTERDAM,
Netherlands.

III - Visits

Sessions of the Court are held on Tuesdays, Wednesdays and Thursdays every week, except during the Court's vacations - that is, from 20 December to 6 January, the week preceding and the week following Easter, and from 15 July to 15 September. Please consult the full list of public holidays in Luxembourg set out below.

Visitors may attend public hearings of the Court or of the Chambers to the extent permitted by the seating capacity. No visitor may be present at cases heard in camera or during proceedings for the adoption of interim measures.

Half an hour before the beginning of public hearings a summary of the case or cases to be dealt with is available to visitors who have indicated their intention of attending the hearing.

* * *

Public holidays in Luxembourg

In addition to the Court's vacations mentioned above the Court of Justice is closed on the following days:

New Year's Day	1 January
Carnival Monday	variable
Easter Monday	variable
Ascension Day	variable
Whit Monday	variable
May Day	1 May
Luxembourg National Holiday	23 June
Assumption	15 August
"Schobermesse" Monday	Last Monday of August or first Monday of September
All Hallows' Day	1 November
All Souls' Day	2 November
Christmas Eve	24 December
Christmas Day	25 December
Boxing Day	26 December
New Year's Eve	31 December

* * *

IV - Summary of types of procedure before the Court of Justice

It will be remembered that under the Treaties a case may be brought before the Court of Justice either by a national court or tribunal with a view to determining the validity or interpretation of a provision of Community law, or directly by the Community institutions, Member States or private parties under the conditions laid down by the Treaties.

A - References for preliminary rulings

The national court or tribunal submits to the Court of Justice questions relating to the validity or interpretation of a provision of Community law by means of a formal judicial document (decision, judgment

or order) containing the wording of the question(s) which it wishes to refer to the Court of Justice. This document is sent by the Registry of the national court to the Registry of the Court of Justice, accompanied in appropriate cases by a file intended to inform the Court of Justice of the background and scope of the questions referred.

During a period of two months the Commission, the Member States and the parties to the national proceedings may submit observations or statements of case to the Court of Justice, after which they will be summoned to a hearing at which they may submit oral observations, through their Agents in the case of the Commission and the Member States or through lawyers who are entitled to practise before a court of a Member State.

After the Advocate-General has delivered his opinion, the judgment given by the Court of Justice is transmitted to the national court through the Registries.

B - Direct actions

Actions are brought before the Court by an application addressed by a lawyer to the Registrar (B.P. 1406, Luxembourg), by registered post.

Any lawyer who is entitled to practise before a court of a Member State or a professor occupying a chair of law in a university of a Member State, where the law of such State authorizes him to plead before its own courts, is qualified to appear before the Court of Justice.

The application must contain:

the name and permanent residence of the applicant;
the name of the party against whom the application is made;
the subject-matter of the dispute and the grounds on which the application is based;
the form of order sought by the applicant;
the nature of any evidence offered;
an address for service in the place where the Court of Justice has its seat, with an indication of the name of a person who is authorized and has expressed willingness to accept service.

The application should also be accompanied by the following documents:

the decision the annulment of which is sought, or, in the case of proceedings against an implied decision, by documentary evidence of the date on which the request to the institution in question was lodged;
a certificate that the lawyer is entitled to practise before a court of a Member State;
where an applicant is a legal person governed by private law, the instrument or instruments constituting and regulating it, and proof that the authority granted to the applicant's lawyer has been properly conferred on him by someone authorized for the purpose.

The parties must choose an address for service in Luxembourg. In the case of the Governments of Member States, the address for service is normally that of their diplomatic representative accredited to the Government of the Grand Duchy. In the case of private parties (natural or legal persons) the address for service - which in fact is merely a "letter box" - may be that of a Luxembourg lawyer or any person enjoying their confidence.

The application is notified to defendants by the Registry of the Court of Justice. It calls for a statement of defence to be put in by them; these documents may be supplemented by a reply on the part of the applicant and finally a rejoinder on the part of the defence.

The written procedure thus completed is followed by an oral hearing, at which the parties are represented by lawyers or agents (in the case of Community institutions or Member States)

After the opinion of the Advocate General has been delivered, judgment is given. It is served on the parties by the Registry.

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COMPOSITION OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

for the judicial year 1977 to 1978

(order of precedence)

H. KUTSCHER, President

M. SØRENSEN, President of Second Chamber

G. REISCHL, First Advocate General

G. BOSCO, President of First Chamber

A. M. DONNER, Judge

J. MERTENS DE WILMARS, Judge

P. PESCATORE, Judge

H. MAYRAS, Advocate General

J.-P. WARNER, Advocate General

LORD MACKENZIE STUART, Judge

A. O'KEEFFE, Judge

F. CAPOTORTI, Advocate General

A. TOUFFAIT, Judge

A. VAN HOUTTE, Registrar

COMPOSITION OF CHAMBERS

First Chamber

President:	G. BOSCO
Judges:	A. M. DONNER
	J. MERTENS DE WILMARS
	A. O'KEEFFE
Advocates General:	H. MAYRAS
	J.-P. WARNER

Second Chamber

President:	M. SØRENSEN
Judges:	P. PESCATORE
	LORD MACKENZIE STUART
	A. TOUFFAIT
Advocates General:	G. REISCHL
	F. CAPOTORTI

J U D G M E N T S

of the

COURT OF JUSTICE

of the

EUROPEAN COMMUNITIES

ANALYTICAL TABLE OF THE CASE-LAW OF THE COURT OF JUSTICE

AGRICULTURE

Case 2/77 - Hoffmann's Stärkefabriken A.G. v Hauptzollamt Bielefeld

Case 125/76 - Peter Cremer v Bundesanstalt für landwirtschaftliche Marktordnung

BRUSSELS CONVENTION

Cases 9 and 10/77 - Bavaria Fluggesellschaft and Germanair

COMMON CUSTOMS TARIFF

Case 1/77 - Robert Bosch GmbH v Hauptzollamt Hildesheim

FREE CIRCULATION OF GOODS

Case 89/76 - Commission v Netherlands

Case 5/77 - Tedeschi v Denkavit

FREE MOVEMENT OF PERSONS

Case 8/77 - Sagulo and Others

HARMONIZATION OF LAWS

Case 123/76 - Commission of the European Communities v Italian Republic

SOCIAL SECURITY FOR MIGRANT WORKERS

Case 112/76 - R. Manzoni v Fonds National de Retraite des Ouvriers Mineurs

Case 22/77 - Fonds National de Retraite des Ouvriers Mineurs v G. Mura

Case 37/77 - F. Greco v Fonds National de Retraite des Ouvriers Mineurs

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

12 July 1977

Commission v Netherlands

Case 89/76

Free movement of goods - Customs duties on exportation - Charges having equivalent effect - Concept - Phytosanitary inspections - International Plant Protection Convention - Free importation into the country of destination - Multinational system of inspections - Absence of obstacles to trade - Fees - Actual cost of inspections - Admissibility - Procedure for financing inspections - Standardization - Powers of the Community institutions

(EEC Treaty, Arts. 12, 16 and 36)

(1) Phytosanitary inspections on exportation, provided for by an International Convention intended to encourage the free import of plants into the countries of destination by establishing a system of inspections in the exporting State, recognized and organized on a reciprocal basis, do not constitute unilateral measures hindering trade but help to overcome the obstacles which the inspections of imports envisaged by Article 36 of the Treaty may place in the way of the free movement of goods.

(2) The fees charged for such inspections are not charges having an effect equivalent to customs duties provided that their amount does not exceed the actual cost of the operations in respect of which they are charged.

(3) The institutions are free to adopt in the future any measures which may be necessary for the standardization of the procedure for the financing of such inspections.

N o t e

The Commission lodged an application for a declaration that by imposing pecuniary charges on exports to other Member States in respect of a phytosanitary examination of plants and certain plant products, the Kingdom of the Netherlands had failed to fulfil its obligations under the Treaty and had, in particular, violated the prohibition on the introduction of charges having an effect equivalent to customs duties contained in Articles 9, 12 and 16 of the Treaty.

The Kingdom of the Netherlands in fact imposes a pecuniary charge in respect of phytosanitary examinations carried out in respect of exports of plants and certain plant products to other Member States and to third countries.

The Commission maintained that those charges, which are imposed on exported products by reason of the fact that they cross the frontier and never on products marketed within the country, constitute a charge having an effect equivalent to a customs duty on exports.

In its defence the Netherlands Government maintained that the pecuniary charges in dispute are intended to cover the costs of examinations carried out when phytosanitary certificates provided for under the International Plant Protection Convention, signed at Rome on 6 December 1951, are issued. Far from forming an obstacle to trade, the issue of such certificates facilitates intra-Community trade by providing the exporter with the assurance that he will not meet with any obstacles to importation in the country of destination. Since the examinations are made and the corresponding certificates issued at the request of the exporter there is no legal obligation to pay the charges in question, with the result that in this instance the criterion of unilateral and compulsory imposition required by the case-law of the Court is not satisfied.

The Commission maintained that as phytosanitary certificates are indispensable in international trade, the exporter is under a de facto obligation imposed by the requirements of the importing country and is therefore unable to escape payment of the charge required by the Netherlands.

The Court has found that the certificates in respect of which the pecuniary charge in question is imposed are in accordance with the International Plant Protection Convention of 6 December 1951, to which all the Member States are party. In international trade the issue of such certificates is intended to encourage the importation of plants into the country of destination without restriction on the basis of the examination carried out in the country of origin of the products in question. Thus, within the area which it covers, that Convention performs a function similar to that of the provisions governing plant hygiene and phytosanitory controls adopted within the Community.

It therefore appears that in this instance the measures in question were not imposed unilaterally by the Kingdom of the Netherlands out of purely national interest but rather constitute an examination organized on the same basis by all the Member States as parties to the Convention of 6 December 1951.

In those circumstances the pecuniary charges imposed when such examinations are carried out cannot be regarded as charges having an effect equivalent to customs duties, provided that their amount does not exceed the real cost of the operations as a result of which they are imposed. The Court has dismissed the application lodged by the Commission against the Netherlands but in doing so emphasized that the present judgment cannot limit the freedom of the Community institutions to adopt in future any provisions which may be necessary to harmonize the rules applicable to the financing of the examinations in question and that for the purposes of that harmonization the present judgment cannot be regarded as providing the Netherlands with an established right to maintain its present system.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

12 July 1977

Hoffmann's Stärkefabriken A.G. v Hauptzollamt Bielefeld

Case 2/77

1. Agriculture - Common organization of the markets - Cereals - Maize starch - Production refund - Calculation - Supply price of basic product - Modification - General power of Council - Free exercise

   (Regulation No. 371/67 of the Council, Art. 2; Regulation No. 1132/74 of the Council, Art. 7; Regulation No. 120/67 of the Council, Arts. 11 (3), 26)

2. Agriculture - Common organization of the markets - Agricultural prices (principle of annual fixing) - Adjustments

3. Agriculture - Common organization of the markets - Maize-starch and potato-starch - Production refund - Calculation - Supply price of basic products - Justification

   (Regulation No. 321/75 of the Council, Art. 1)

1. It cannot be conceded that, when the Council adopted the specific provision in Article 2 of Regulation No. 371/67 and Article 7 of Regulation No. 1132/74, it intended to restrict the exercise of a general power which it had expressly conferred on itself by Articles 11 (3) and 26 of Regulation No. 120/67 and which it required to exercise freely for the proper administration of the relevant organization of the market.

2. Whilst the annual fixing of agricultural prices indeed constitutes a basic economic feature of the common agricultural policy as it is at present implemented such fixing neither implies that those prices cannot be changed in any circumstances nor, in consequence, does it prohibit the Council from adjusting them in the course of the marketing year, when such adjustments are justified.

3. There are objective grounds for the difference between the treatment accorded potato-starch producers and that accorded maize-starch producers in the matter of the calculation of the production refund following a change in the supply price of the basic product so that the transitional measure enacted by Article 1 of Regulation No. 231/75 in connexion with the production refund for potato-starch does not constitute discrimination against maize-starch producers.

N o t e

The Finanzgericht Münster referred two questions to the Court for a preliminary ruling. The first concerned the validity of Article 1 (1) of Regulation (EEC) No. 3113/74 of the Council of 9 December 1974 on production refunds in the cereals and rice sectors.

The second question, which was asked in the alternative, concerned the interpretation of the second subparagraph of Article 40 (3) of the EEC Treaty in connexion with the methods of calculating the production refunds on potato and maize starch.

Those questions were referred within the context of a dispute between Hoffmann's Stärkefabriken AG and the Hauptzollamt Bielefeld over the amount payable to the applicant by way of a production refund on maize intended for the manufacture of starch.

The first question, which concerns the validity of Article 1 (1) of Regulation (EEC) No. 3113/74 of the Council, asks whether the provision in question is invalid or, at the least, inapplicable on three grounds.

1. According to the first of those grounds, the requirements of an appreciable and persistent variation in the price of maize on the world market, that is, in particular, a rise in price in relation to the supply price, were not satisfied in December 1974 when the Council fixed the supply price at 103.10 units of account per metric ton.

The Court has stated that it emerges from an analysis of basic Regulation No. 120/67 that the supply price (the level of which, unlike the threshold price, determines the amount of the refund) must be fixed having regard to all the factors which determine the competitive position of the manufacture of starch from maize in relation, first, to synthetic substitutes and, secondly, to potato starch.

It cannot be accepted that when it adopted the special rule providing for the specific alteration of the supply price referred to in Article 7 of Regulation No. 1132/74 the Council intended to restrict the exercise of a general power which it had expressly assumed. When it found that prices were remaining at a very high level and that, as compared with the period before 1 January 1973, there was an appreciable and persistent variation in world prices, the Council was not exceeding its discretionary power in that matter.

The maintenance of world prices at such high levels could not fail to affect the fixing of the supply price since, in so far as the refund was intended to compensate for the handicap suffered by manufacturers of starch from maize as a result of their inability to obtain raw materials at prices close to those on the world market, that high level of prices removed all justification for the refund. At no time was it alleged that the reduction in the refund affected, in a manner unfavourable to producers of maize starch, the competitive situation existing between them and producers of synthetic starch or manufacturers of potato starch.

2. The second ground suggests that when it adopted the regulation in dispute the Council violated Article 11 of basic Regulation No. 120/67 by reducing, with a view to its gradual abolition, a refund to which manufacturers of maize starch were entitled. The Court observed that although the text of Article 11 of Regulation No. 120/67 does not appear to make the grant of the refund optional it does, however, give the Council power to fix the amount in question in the light of the objectives of general interest listed in Article 39 of the Treaty.

3. The third and final ground put forward by the plaintiff in the main action raises the question whether the regulation in dispute is invalid in that it violates the principle that agricultural prices shall remain unchanged during a single marketing year.

The Court has replied that even though the annual fixing of agricultural prices is indeed a basic economic element of the common agricultural policy it cannot imply either that, whatever happens, those prices will remain unchanged or, as a result, that the Council is prohibited from making justified adjustments during a marketing year.

A secondary question from the national court asked the Court of Justice to interpret the second subparagraph of Article 40 (3) of the EEC Treaty (prohibition on discrimination between producers or consumers within the Community) and Regulation No. 1132/74 (requirement that the production refunds on potato and maize starch shall be equal) in conjunction with Article 1 (1) of Regulation No. 3113/74 concerning the calculation of the production refund for maize starch.

The Court has ruled that the difference between the treatment of producers of potato starch and that of producers of maize starch is objectively justified and that therefore the transitional measure adopted in relation to the production refund on potato starch does not constitute discrimination with regard to producers of maize starch.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

14 July 1977

Sagulo and Others

Case 8/77

1. Freedom of movement for persons - Nationals of Member States - Right of entry and residence - Right directly conferred by Community law - Acknowledgement - Special residence document - Issue - Declaratory effect - Not to be assimilated to general residence permit for aliens - No discretion on the part of national authorities

   (EEC Treaty, Art. 48; Directive No. 68/360, Art. 4)

2. Freedom of movement for persons - Nationals of Member States - Document prescribed by Directive No. 68/360 - General residence permit - Requirement by a Member State - Penalties - Not permissible

   (Directive No. 68/360, Art. 4(2) and Annex)

3. Freedom of movement for persons - Nationals of Member States - General residence permit - National provisions - Non-conformity with Community law - Infringement - Directive No. 68/360 - National implementing measures - Infringement - Increase in penalties - Not permissible

4. Freedom of movement for persons - Nationals of Member States - Documents of identity referred to in Directive No. 68/360 - Penalties - Nature of offence committed - Proportionality

   (EEC Treaty, Art. 7; Directive No. 68/360)

1. The right of nationals of Member States to enter the territory of another Member State and to reside there for the purposes mentioned in the Treaty follows directly from the Treaty or from the provisions adopted for its implementation.

   The issue of the special residence document provided for in Article 4 of Council Directive No. 68/360 of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families has only a declaratory effect; for aliens to whom Article 48 of the Treaty or parallel provisions give rights, it cannot be assimilated to a residence permit such as is prescribed for aliens in general, in connexion with the issue of which the national authorities have a discretion.

2. A Member State may not require from a person enjoying the protection of Community law that he should possess a general residence permit instead of the document provided for in Article 4(2) of Directive No. 68/360 in conjunction with the Annex thereto nor may it impose penalties for the failure to possess such a permit.

3. The force of res judicata arising from a prior conviction arrived at on the basis of national provisions not in accordance with the requirements of Community law cannot justify an increase in the penalties to be imposed for an infringement of the provisions which a Member State has adopted to secure the application of Directive No. 68/360 in its territory.

4. It is for the competent authorities of each Member State to impose penalties where appropriate on a person subject to the provisions of Community law who has failed to provide himself with one of the documents of identity referred to in Article 3(1) of Directive No. 68/360 but the penalties imposed must not be disproportionate to the nature of the offence committed.

N o t e

In this case two Italian nationals and a French national were the subject of criminal proceedings brought under the German Ausländergesetz (Aliens Law) of 28 April 1965.

Those proceedings resulted in a court order imposing a fine on the two Italian nationals for having resided in the Federal Republic of Germany without a valid passport or identity card, that is, therefore, without any valid residence permit.

Although the French national was in possession of a valid passport he had refused to comply with the formalities required by the German authorities in order to obtain a residence permit and was detained for a short time in order for criminal proceedings to be brought against him; he was accused of having failed to take the necessary steps to regularize his position.

The above facts led the Amtsgericht Reutlingen to ask the Court of Justice to give a preliminary ruling on the interpretation of Articles 7 and 48 of the EEC Treaty (concerning the prohibition of discrimination on grounds of nationality and freedom of movement for workers) and of Article 4 of Council Directive No. 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.

The questions referred ask, basically, whether the Member States are still entitled to apply to persons enjoying the protection of Community law general legislative provisions relating to the entry and residence of aliens and, where appropriate, the penalties attaching to an infringement of those provisions.

It is undeniable that the right of nationals of a Member State to enter the territory of another Member State and to stay there derives directly from the Treaty or from the provisions adopted for its implementation.

Nevertheless, Community law has not deprived Member States of the power to adopt measures designed to enable the national authorities to obtain precise information concerning movements of population within their territory.

It is in order to enable States to obtain such information that Directive No. 68/360 provided for two formalities, that is, possession of a valid identity card or national passport and proof of the right of residence through the issue of a document known as a "Residence Permit for a National of a Member State of the EEC". Since the Member States are entitled to choose the manner in which they will give effect to the provisions of the directive within their territory it is for them to introduce criminal sanctions or to apply those which are provided for in their general legislation.

However, a Member State is not entitled to adopt administrative or legal measures which would have the effect of restricting the full exercise of rights conferred by Community law on the nationals of the other Member States.

Community law cannot preclude the application of appropriate measures of constraint in the case of infringement of national provisions adopted in accordance with Directive No. 68/360; similarly, the repeated disregard of provisions adopted by a Member State in implementation of that directive may, where appropriate, justify an increase in the severity of the penalties applicable. However, the fact that an earlier conviction has become res judicata cannot in itself constitute grounds for a heavier penalty on a subsequent conviction.

In reply to those questions the Court has ruled that:

(1) The issue of the special residence document provided for in Article 4 of Council Directive No. 68/360 of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families is only declaratory in effect and, as regards aliens who derive rights under Article 48 of the EEC Treaty or under comparable provisions, cannot be regarded as a residence permit involving discretionary power on the part of the national authorities, such as is provided for in respect of aliens in general.

(2) A Member State may not require from a person enjoying the protection of Community law possession of a residence permit in place of the document provided for in the combined provisions of Article 4 (2) and the Annex to Directive No. 68/360, nor may it impose penalties in cases where no such permit has been issued.

(3) The fact that an earlier conviction, obtained on the basis of national provisions which are not in accordance with the requirements of Community law, has become res judicata cannot justify an increase in the severity of penalties applicable in the case of infringement of the provisions adopted by a Member State in order to secure the application within its territory of Directive No. 68/360.

A further question referred asked whether the fact that a person entitled by Community law to reside in the territory of a Member State failed to obtain valid identity papers as expressly required by the directive does not create discrimination, as regards the sanctions applied, between a person subject to Community law, who is liable to relatively heavy penalties, and a national of the Member State in question who is subject to considerably lighter ones.

The Court has ruled that it is for the competent authorities of each Member State to apply where appropriate criminal sanctions to a failure by a person governed by the provisions of Community law to obtain one of the types of proof of identity referred to in Article 3 (1) of Directive No. 68/360, but that the sanctions applied in such a case must not be out of proportion to the nature of the offence committed.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

14 July 1977

Commission of the European Communities v Italian Republic

Case 123/76

Harmonization of laws relating to electrical equipment - Council Directive No. 73/23 (EEC) - Mandatory application

In setting a precise period for the putting into force of national provisions, Article 13 of Directive No. 73/23 (EEC) requires the adoption of provisions ensuring that Articles 5 to 8 of the directive shall apply fully and immediately in cases to which they relate. For the purposes of the directive and of Article 13 thereof, it does not suffice for Member States to postpone the implementation of that article until the time when the standards concerned have been adopted.

N o t e

The Commission applied to the Court for a declaration that "by failing to put into force, within the required time-limit, the provisions necessary in order to conform with Council Directive No. 73/23/EEC of 19 February 1973, on the harmonization of the laws of Member States relating to electrical equipment designed for use within certain voltage limits, the Italian Republic has failed to fulfil an obligation under the Treaty".

Article 13 of that directive provides that "The Member States shall put into force the laws, regulations and administrative provisions necessary to comply with the requirements of this Directive within eighteen months of its notification and shall forthwith inform the Commission thereof".

In its defence, the Italian Government maintained that as a result of the premature dissolution of the legislature it had been impossible for the Chamber of Deputies to approve the draft law submitted for the implementation of the directive. It added that although the adoption of new legislation was necessary in order to ensure the implementation of the directive as a whole its essential provisions were already applied in the Italian legal system through the existing legislation and rules.

As the time-limit for introducing the legislation had passed, the question arose as to whether the Italian Republic had failed to fulfil an obligation arising under Article 13 of the directive.

The defence submitted that as long as no harmonized or international rules have been adopted the Member States are not bound to put into force the laws, regulations and administrative provisions necessary to comply therewith and to ensure the application thereof within their territory.

In the opinion of the Court the foregoing argument disregards the fact that by fixing a specific period (18 months) within which the national provisions must be put into force, Article 13 requires the establishment of a framework ensuring that Articles 5 to 8 of the directive take full and immediate effect in the cases provided for in those provisions.

The Court has held that by failing to put into force within the required period the provisions necessary to comply with Council Directive No. 73/23/EEC of 19 February 1973 the Italian Republic failed to fulfil an obligation arising under the Treaty.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

14 July 1977

Bavaria Fluggesellschaft Schwabe & Co. and Germanair Bedarfsluftfahrt GmbH & Co. v Eurocontrol, Brussels

Joined Cases 9 and 10/77

1. Convention of 27 September 1968 - Concepts and legal classifications laid down by the Court - Uniform application in the Member States

2. Convention of 27 September 1968 - Judgments excluded from the scope of the latter - Bilateral agreements - Application - Exclusive jurisdiction of national court

(Convention of 27 September 1968, Art. 55, first paragraph of Art. 56, Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968, Art. 1)

1. The principle of legal certainty in the Community legal system and the objectives of the Brussels Convention in accordance with Article 220 of the EEC Treaty, which is at its origin, require in all Member States a uniform application of the legal concepts and legal classifications developed by the Court in the context of the Brussels Convention.

2. A national court must not apply the Brussels Convention so as to recognize or enforce judgments which are excluded from its scope as determined by the Court of Justice. On the other hand, it is not prevented from applying to the same judgments one of the special agreements referred to in Article 55 of the Brussels Convention, which may contain rules for the recognition and enforcement of such judgments. As the first paragraph of Article 56 of the Brussels Convention recognizes, these agreements continue to have effect in relation to judgments to which the Brussels Convention does not apply. Since Article 1 of the Protocol of 3 June 1971 gives the Court jurisdiction to interpret only the Brussels Convention and the Protocol, it is solely for the national courts to judge the scope of the above-mentioned agreements in relation to judgments to which the Brussels Convention does not apply. This may lead to the same expression in the Brussels Convention and in a bilateral agreement being interpreted differently.

N o t e

In 1974 the Tribunal de Commerce (Commercial Court), Brussels, ordered Bavaria and Germanair to pay to Eurocontrol certain charges imposed in respect of air traffic control. Those judgments, which were provisionally enforceable, became final after the legal remedies available in Belgium had been exhausted.

On the basis of the "Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters" Eurocontrol applied to the Landgericht München and the Landgericht Frankfurt for the enforcement of the above-mentioned judgments.

The Oberlandesgericht München and the Oberlandesgericht Frankfurt, to which those cases were referred, ordered the enforcement of the Belgian judgments.

Germanair and Bavaria then appealed to the Bundesgerichtshof, which asked the Court of Justice to give a preliminary ruling on the following question:

"Under Article 56 of the Convention do the Treaty and Conventions referred to in Article 55 continue to have effect in relation to decisions which do not fall under Article 1 (2) of the Convention but are excluded from the scope of application of the Convention?"

The Convention provides as follows:

Article 1

"This Convention shall apply in civil and commercial matters ... . The Convention shall not apply to:

1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship ...;

2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

3. social security;

4. arbitration."

Article 55

"Subject to the provisions ... of Article 56, this Convention shall, for the States which are parties to it, supersede the following conventions concluded between two or more of them:

.....

The Convention between the Federal Republic of Germany and the Kingdom of Belgium on the Mutual Recognition and Enforcement of Judgments, Arbitration Awards and Authentic Instruments in Civil and Commercial Matters, signed at Bonn on 30 June 1958."

Article 56

"The Treaty and the conventions referred to in Article 55 shall continue to have effect in relation to matters to which this Convention does not apply".

In its judgment in Case 29/76 (LTU Lufttransportunternehmen GmbH & Co., KG v Eurocontrol [1976] ECR 1541), which concerned charges of a type similar to those involved in this instance, the Court ruled that:

(a) In the interpretation of the concept "civil and commercial matters" ... reference must ... be made, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems;

(b) A judgment given in an action between a public authority and a person governed by private law, in which the public authority has acted in the exercise of its powers, is excluded from the area of application of the Convention.

Having regard to all of the foregoing provisions and case-law the question referred asks basically whether and to what extent the legal concepts defined by the Court within the context of the Convention are binding upon national courts and tribunals for the purposes of the possible application of a bilateral agreement in areas which are excluded from the area of application of the Convention.

According to Article 56 (1) of the Convention, bilateral conventions continue to have effect in relation to matters to which the Brussels Convention does not apply.

The Brussels Convention "shall apply in civil and commercial matters" (first paragraph of Article 1), while the convention between Germany and Belgium governs the "Recognition of Judgments ... in Civil and Commercial Matters".

In its judgment in Case 29/76 (LTU v Eurocontrol) the Court interpreted the words "civil and commercial matters" as an independent concept and not as a reference to the internal law of one or other of the States concerned.

Since the Protocol of 3 June 1971 gave the Court of Justice jurisdiction to give rulings only on the interpretation of the Convention and of the Protocol, it is for national courts and tribunals alone to assess the scope of the aforementioned agreements with regard to judgments which are excluded from the area of application of the Convention.

The Court has ruled that the first paragraph of Article 56 of the Convention does not prevent a bilateral convention such as the convention between the Federal Republic of Germany and the Kingdom of Belgium referred to in the sixth paragraph of Article 55 from continuing to have effect in relation to judgments which do not fall within the terms of the second paragraph of Article 1 of the Convention but are excluded from its area of application.

In its decision the Court emphasized that it was aware that the foregoing conclusion may lead to differing interpretations being made of the same expression in the Brussels Convention and in a bilateral convention as a result of the difference existing between systems in which the phrase "civil and commercial matters" is used.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

14 July 1977

Robert Bosch GmbH v Hauptzollamt Hildesheim

Case 1/77

1. Common Customs Tariff – Value for customs purposes – Determination thereof – Criteria

2. Common Customs Tariff – Value for customs purposes – Determination thereof – Normal price of goods – Value of a patented process – Inclusion – Conditions
(Regulation No. 803/68 of the Council, Art. 3)

1. The Common Customs Tariff concerns only the importation of goods, that is, tangible property, and does not apply to the importation of incorporeal property such as processes, services or know-how. Therefore, for the purpose of the determination of the value for customs purposes, it is in principle necessary to concentrate only on the intrinsic value of the article and to disregard the value of processes, which may be patented, in which it may be used.

2. The result of an interpretation of Article 3 in accordance with the objectives of the basic provision laid down by Article 1 of the regulation is that a patented process, the carrying out of which constitutes the only economically viable use of the goods and which is only put into effect by the use of those goods, is regarded as embodied in the imported goods.

Article 3 (1) (a) of Regulation No. 803/68 of the Council is to be interpreted as meaning that the normal price of goods includes the value of a patented process where the protected process is inseparably embodied in and constitutes the only economically viable use of the goods.

N o t e

The Finanzgericht Hamburg referred to the Court of Justice for a preliminary ruling a question concerning the interpretation of Regulation (EEC) No. 803/68 of the Council on the valuation of goods for customs purposes.

The question arose within the context of a dispute concerning the valuation for customs purposes of a COS (cast-on-strap) machine which is protected by a product invention patent at the same time as the use of that machine for the process of manufacture of terminal brides for lead-acid batteries is protected by a process patent.

The question asks whether the patented process must be taken into account in determining the "normal price", that is to say, the value of the machine for customs purposes.

The Court has ruled that Article 3 (1) of Regulation (EEC) No. 803/68 of the Council must be interpreted to mean that the normal price of goods includes the value of a patented process where the protected process is inseparably embodied in that product and constitutes the only economically viable use of it.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

15 October 1977

Carlo Tedeschi v Denkavit Commerciale s.r.l.

Case 5/77

1. Questions referred to the Court for a preliminary ruling - Powers of the Court - Limits
(EEC Treaty, Art. 177)

2. Agriculture - Feedingstuffs - Additives and undesirable substances - Distinction
(Council Directive No. 70/524 of 23 November 1970 and Council Directive No. 74/63 of 17 December 1973)

3. Free movement of goods - Derogation laid down by the Treaty - Limitation - Harmonizing directive - Article 36 not applicable

4. Agriculture - Feedingstuffs - Undesirable substances - Powers of the Member States
(Directive No. 74/63, Art. 5)

1. Article 177 is based on a distinct separation of functions between national courts and tribunals on the one hand and the Court of Justice on the other, and it does not give the Court jurisdiction to take cognizance of the facts of the case, or to criticize the reasons for the reference. Therefore, when a national court or tribunal refers a provision of Community law for interpretation, it is to be supposed that the said court or tribunal considers this interpretation necessary to enable it to give judgment in the action. Thus the Court cannot require the national court or tribunal to state expressly that the provision which appears to that court or tribunal to call for an interpretation is applicable. The Court may however provide the national court with the factors of interpretation depending on Community law which might be useful to it in evaluating the effects of the provision which is the subject-matter of the questions which have been referred to it.

2. Directive No. 70/524 (additives) and Directive No. 74/63 (undesirable substances) although both relating to the composition of feedingstuffs make, as regards their respective fields of application, a distinction between certain substances which are intentionally added to those feedingstuffs so as to produce a favourable effect on their characteristics and, on the other, undesirable substances which are inevitably present in those feedingstuffs either in the natural state or as residues from processing previously undergone by those feedingstuffs

or by the constituents of those feedingstuffs. In these circumstances a substance which, because of a previous admixture, independent of the use for animal feeding, is necessarily present in one of the constituents of the feedingstuff as a residue from the previous manufacture of another product may not be considered as an additive. The control of the presence of such substances comes within Directive No. 74/63 (undesirable substances) and not within Directive No. 70/524 (additives).

3. Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article. Where, in application of Article 100 of the Treaty, Community directives provide for the harmonization of the measures necessary to ensure the protection of animal and human health and establish Community procedures to check that they are observed, recourse to Article 36 is no longer justified and the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonizing directive.

4. (a) Even after the entry into force of harmonizing Directive No. 74/63, the Member States have, within the context of Article 5 of that directive and subject to the material and procedural requirements laid down therein, the power provisionally to consider as undesirable certain substances which, although known and recognized when that directive was adopted, do not appear in the list annexed thereto, provided that the measures adopted apply on identical terms to both national products and to products imported from other Member States.

(b) Subject to the obligation not to discriminate between imported products and national products, Article 5 of Directive No. 74/63 enables a Member State to fix, on a provisional basis, the maximum permitted level of a substance contained in imported feedingstuffs made from powdered milk even though no maximum level has ever been fixed in the past either in the exporting Member State or in the importing Member State.

(c) Article 5 of Directive No. 74/63 enables a Member State to prohibit the marketing of the products which have been found to infringe the temporary national provisions which it is empowered to adopt. For products coming from other Member States such prohibition on marketing may take the form of a prohibition on importation.

N o t e

What is the maximum quantity of undesirable substances (undesirable from the point of view of the Community rules) which Community producers may still add to feeding-stuffs, despite those rules? That is the question which was referred to the Court of Justice of the European Communities by the Pretura di Lodi (Italy).

The feeding-stuffs sector has been the subject-matter of several Community directives aimed at harmonizing the national provisions intended to ensure that such feeding-stuffs do not constitute a danger to animal and human health. Among these are Council Directive No. 70/524 of 23 November 1970 (Official Journal, English Special Edition 1970 (III), p. 840) concerning additives in feeding-stuffs and Council Directive No. 74/63/EEC of 17 December 1973 (Official Journal No. L 38of 11 February 1974, p. 31) on the fixing of maximum permitted levels for undesirable substances and products in feeding-stuffs.

Under Article 3 of Directive No. 74/63/EEC Member States shall prescribe that the substances and products listed in the Annex shall be tolerated in feeding-stuffs only under the conditions and up to the maximum level fixed by that Annex. Under Article 7 of the Directive feeding-stuffs which conform to its provisions may not be subject to any other marketing restrictions as regards the presence of undesirable substances and products. However, Article 5 provides for a safeguard clause, which is worded as follows:

1. Where a Member State considers that a maximum content fixed in the Annex, or that a substance or product not listed therein, presents a danger to animal or human health, that Member State may provisionally reduce this content, fix a maximum content, or forbid the presence of that substance or product in feeding-stuffs; it shall advise the other Member States and the Commission without delay of the measures taken and at the same time give its reasons.

2. In accordance with the procedure laid down in Article 10, an immediate decision shall be made as to whether the Annex should be modified. So long as no decision has been made by either the Council or the Commission the Member State may maintain the measures it has implemented.

The procedure laid down in Article 10 involves a decision by the Commission after consultation with the Standing Committee for Feeding-stuffs. However, if the Committee delivers no Opinion, or if the Commission proposes to adopt measures which are not in accordance with the Opinion, it must refer the measures to the Council, which shall adopt them by a qualified majority.

If the Council has not adopted any measures within fifteen days of the proposal being submitted to it, the Commission shall adopt the measures in question and implement them forthwith, except where the Council has voted by a simple majority against them.

Mr Tedeschi, the plaintiff in the main action, purchased from the Denkavit company, the defendant in the main action, 1,000 kg of feeding-stuffs made from milk powder from the Netherlands, to be delivered in September 1976, and paid a deposit of 350,000 lire. The goods were not delivered because they were stopped at the frontier by the frontier veterinary officer in accordance with an urgent note from the Italian Minister of Health of 7 September 1976 prohibiting the importation of feeding-stuffs made from milk powder or whey containing more than 30 and 50 parts per million (mg per kg) respectively of nitrates.

The purchaser brought an action before the Pretura di Lodi against the defendant in the main action for refund of the deposit and payment of damages. Before that court both the defendant in the main action and the interveners put forward arguments based on the unlawful nature of the prohibition on importation.

Since it considered that the Community rules relied on before it by the parties to the main action did not clearly show the limits of the powers conferred upon the Member States, the Pretura di Lodi decided, by order of 17 December 1976, to refer to the Court a certain number of questions concerning the exact boundary between the Community rules and the internal law of the Member States.

In reply, the Court of Justice has ruled that:

Even after the entry into force of harmonizing Directive No. 74/63 the Member States have the power, within the context of Article 5 of that directive and subject to the material and procedural requirements laid down therein, to consider provisionally as undesirable specific substances which, although known and recognized when that directive was adopted, do not appear in the list annexed thereto, provided that the measures adopted apply on identical terms to both national products and to products imported from the other Member States;

Subject to the obligation not to discriminate between imported products and national products, Article 5 of Directive No. 74/63 enables a Member State to fix, on a provisional basis, the maximum permitted level of a substance contained in feeding-stuffs made from imported milk powder even though no maximum level has ever been fixed in the past either in the exporting Member State or in the importing Member State;

Article 5 of Directive No. 74/63 enables a Member State to prohibit the marketing of the products which have been found to infringe the temporary national provision which it is empowered to adopt. For products coming from other Member States such prohibition on marketing may take the form of a prohibition on importation;

Consideration of the fourth question has disclosed no factor of such a kind as to affect the validity of Article 5 of Directive No. 74/63.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

11 October 1977

Peter Cremer v Bundesanstalt für landwirtschaftliche Marktordnung

Case 125/76

1. Agriculture - Common organization of the markets - Compound feeding-stuffs for cattle - Export to third countries - Refund - Grant - Conditions - Application to compound feeding-stuffs not containing powdered milk
(Regulation No. 171/64 of the Commission)

2. Agriculture - Common organization of the markets - Compound feeding-stuffs for cattle - Export to third countries - Refund - Grant - Conditions - Composition of the product - Minimum content
(Regulation No. 166/64 of the Council; Regulation No. 171/64 of the Commission)

1. Export refunds to third countries may under Regulation No. 171/64 of the Commission of 30 October 1964 be granted for compound animal feeding-stuffs containing either cereals or cereal-based products or milk or milk products.

2. Having regard to the objectives of the system of export refunds, an export refund for a compound animal feeding-stuff containing cereals or cereal-based products can be granted under Regulation No. 166/64 of the Council of 30 October 1964 and Regulation No. 171/64 of the Commission only where cereals or products to which Regulation No. 19 of the Council of 4 April 1962 on the progressive establishment of a common organization of the markets in cereals applies are in fact contained in the mixture in significant proportions.

N o t e

The Finanzgericht (Finance Court) Hesse, referred to the Court of Justice for a preliminary ruling a series of questions on the interpretation of Regulation No. 166/64/EEC of the Council on the levy system applicable to certain kinds of compound animal feeding-stuffs (Journal Officiel 1964, p. 2747) and on the interpretation and validity of Regulation No. 171/64/EEC of the Commission defining the terms for granting refunds on exports to third countries for certain kinds of animal feeding-stuffs (Journal Officiel 1964, p. 2758).

In 1964 and 1965 a German company exported approximately 3 metric tons of a product described as "animal food treated with molasses or sweetened - a feeding-stuff for swine" from the Federal Republic of Germany to Denmark, which was at that time a third country. The product consisted of 73 % tapioca chips, 2 % tapioca meal, 22 % coarse soya meal and 3 % mineral matter. It contained more than 50 % starch. The exporter obtained export refunds in the form of licences authorizing the importation free of levy of a quantity of cereals equal to the quantity of the processed products exported. Those licences were assigned to the Cremer undertaking, the plaintiff in the main action.

An inquiry by the German customs investigation authorities showed, in particular, that in Denmark most of the tapioca chips were sifted out of the product and then sold and delivered to an undertaking established in the Netherlands which was legally connected with Cremer.

As a result of the sifting out of the tapioca chips the starch content fell below 50 %, so that the remaining product no longer satisfied the requirements necessary in order to benefit from the refunds.

The Court gave the following answers to the questions referred to it:

1. Regulation No. 171/64/EEC of the Commission of 30 October 1964 defining the terms for granting refunds on exports to third countries of certain kinds of animal feeding-stuffs also applies to compound animal feeding-stuffs which do not contain powdered milk;

2. An export refund on a compound feeding-stuff, other than a feeding-stuff containing 50 % or more by weight of powdered milk, may only be granted under Regulation No. 166/64/EEC of the Council of 30 October 1964 on the levy system applicable to certain kinds of compound animal feeding-stuffs and Regulation No. 171/64/EEC of the Commission if the mixture actually contains a substantial quantity of the cereals or products to which Regulation No. 19 of the Council of 4 April 1962 on the gradual establishment of a common organization of the market in cereals applies;

3. For the purposes of the application of the coefficients listed in Annex A to Regulation No. 166/64/EEC of the Council, the starch content of the preparations referred to therein must be considered by reference to the compound feeding-stuff in its entirety and not by reference to the ingredients to which Regulation No. 19 applied;

4. Consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Regulation No. 166/64/EEC of the Council.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

13 October 1977

R. Manzoni v Fonds National de Retraite des Ouvriers Mineurs

Case 112/76

1. Social security for migrant workers - Social security benefits - Overlapping - Limitation - Entitlement by virtue of a national legislation alone - Reduction - Prohibition
(EEC Treaty, Art. 51; Regulation No. 1408/71 of the Council, Art. 46 (3))

2. Social security for migrant workers - Insurance periods - Duplication - Social security benefits - Rules against overlapping - Application - Condition
(Regulation No. 1408/71 of the Council, Art. 46 (3))

1. An application of Article 46 (3) of Regulation No. 1408/71 which would lead to a diminution of the rights which the persons concerned already enjoy in a Member State by virtue of the application of the national legislation alone is incompatible with Article 51. Article 46 (3) of Regulation No. 1408/71 is incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on benefits acquired in different Member States by a reduction in the amount of a benefit acquired under the national legislation of a Member State alone.

2. The application of rules preventing the overlapping of benefits where there is duplication of insurance periods is possible only where for the acquisition or calculation of the worker's right it is necessary to have recourse to aggregation of the insurance periods and apportionment of the benefits.

N o t e

The Tribunal du Travail (Labour Tribunal), Charleroi, referred to the Court certain questions concerning the interpretation of Article 51 of the EEC Treaty and Article 46 (3) of Regulation No. 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community.

The main action concerns the way in which the Belgian institution calculated the invalidity pension of the plaintiff in the main action, an Italian worker, who satisfied in Belgium all the conditions stipulated by the national legislation for entitlement to an invalidity pension under the scheme for mine workers. On the other hand, in order to acquire a right to benefit in Italy, where he had worked for more than 5 years, he had to rely on the provisions of Article 45 of Regulation No. 1408/71 and for the purpose of calculating that benefit the periods completed in both Member States were aggregated and a proportion of the Italian benefit was awarded.

Relying upon the rule limiting benefits which is laid down by Article 46 (3) of Regulation No. 1408/71, the Belgian institution took the view that it was entitled to reduce the invalidity pension by the amount of the pro rata pension paid in Italy and claimed the reimbursement of the sum overpaid.

That prompted the Tribunal du Travail, Charleroi, to ask the Court of Justice whether, "if the pension paid by the Belgian State under the present invalidity pension scheme for mine workers established by the Royal Decree of 19 November 1970 and subsequent amending decrees is reduced on the basis of Article 46 (3) of Regulation No. 1408/71 by reason of the benefits paid by other Member States, such reduction is in accordance with Article 51 of the Treaty of Rome".

Basing itself on one of its earlier decisions (Case 24/75, Petroni v ONPTS [1975] ECR 1149) the Court ruled that Article 46 (3) appears to be a rule imposing a limitation on the sum of the various pro rata benefits and that the Council, in the exercise of the powers which it holds under Article 51 concerning the co-ordination of the social security schemes of the Member States, has the power, in conformity with the provisions of the Treaty, to lay down detailed rules for the exercise of rights to social benefits, including invalidity benefits, which the persons concerned derive from the Treaty.

However, an application of Article 46 (3) of Regulation No. 1408/71 which would lead to a diminution of the rights which the persons concerned already enjoy in a Member State by virtue of the application of the national legislation alone is incompatible with Article 51 of the Treaty.

In conclusion, the Court ruled that Article 46 (3) of Regulation No. 1408/71 is incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on the benefits acquired in different Member States by a reduction in the amount of the benefit acquired under the national legislation of one Member State alone.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

13 October 1977

Fonds National de Retraite des Ouvriers Mineurs v G. Mura

Case 22/77

Social security for migrant workers - Social security benefits - Entitlement by virtue of national legislation alone - Full application of the latter - Advantages of the system - Aggregation and apportionment - Preference

Regulation No. 1408/71, Art. 46 (1)

So long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation No. 1408/71 do not prevent the national legislation, including the national rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable than the application of the rules regarding aggregation and apportionment those rules must, by virtue of Article 46 (1) of Regulation No. 1408/71, be applied.

N o t e

Like Case 112/76 above, this case is a reference for a preliminary ruling on the interpretation of Community legislation with regard to national rules against the overlapping of benefits. The main action concerns the calculation by the competent Belgian institution of the invalidity pension to be awarded to an Italian national, the defendant in the main action, who had been employed as a mine worker first in France and then in Belgium.

He satisfied all the conditions laid down in Belgium for entitlement to an invalidity pension under the scheme for mine workers but to acquire a right to a pension in France he had to rely on the provisions of Article 45 of Regulation No. 1408/71.

The Belgian institution applied the national rules against overlapping of benefits and subtracted the theoretical amount of the French pension. That prompted the Cour du Travail (Labour Court), Mons, to ask the Court of Justice whether Article 12 of Regulation No. 1408/71 authorizing the overlapping of benefits must take precedence over national rules against overlapping in cases in which the Community provisions result in a migrant worker being placed in a more favourable position than a worker who remains in one State.

The Court made the observation that any possible differences which may exist to the benefit of the migrant worker do not result from the interpretation of Community law but rather from the lack of any common social security system or of any harmonization of the existing national schemes, the consequences of which cannot be mitigated by the simple co-ordination at present practised.

The Court reiterated the reasoning which it used in its judgment in Case 24/75, Petroni v ONPTS, and replied by ruling that so long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation No. 1408/71 do not prevent the national legislation, including national rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable than the application of the rules on aggregation and apportionment, those rules must by virtue of Article 46 (1) of Regulation No. 1408/71 be applied.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

13 October 1977

F. Greco v Fonds National de Retraite des Ouvriers Mineurs

Case 37/77

Social security for migrant workers - Social security benefits - Entitlement by virtue of national legislation alone - Full application of the latter - Advantages of the system - Aggregation and apportionment - Preference

Regulation No. 1408/71, Art. 46 (1)

So long as a worker is receiving a pension by virtue of national legislation alone, the provisions of Regulation No. 1408/71 do not prevent the national legislation, including the national rules against the overlapping of benefits, from being applied to him in its entirety, provided that if the application of such national legislation proves less favourable than the application of the rules regarding aggregation and apportionment those rules must, by virtue of Article 46 (1) of Regulation No. 1408/71, be applied.

N o t e

Since the issue in this case is identical to that in Case 22/77 (Mura) above, the Court has given an identical judgment.

VISIT OF THE EUROPEAN COURT OF HUMAN RIGHTS

and

EUROPEAN COMMISSION OF HUMAN RIGHTS

(29 and 30 September 1977)

At the invitation of the Court of Justice of the European Communities, the European Court of Human Rights and a delegation from the European Commission of Human Rights visited Luxembourg on 29 and 30 September 1977.

Two working sessions presided over by Professor Hans Kutscher, President of the Court of Justice, Professor Giorgio Balladore Pallieri, President of the Court of Human Rights and Mr James E.S. Fawcett, President of the Commission of Human Rights, were held.

By way of introduction, papers were given on the one hand by Mr Max Sørensen, Judge of the Court of Justice, and on the other by Viscount Ganshof van der Meersch, Judge of the Court of Human Rights and President Fawcett on numerous points of common interest in the functioning and case-law of these courts.

A wide-ranging discussion developed on fundamental issues such as the difference between the objectives of the European treaties and those of the Convention on Human Rights; the methods of interpretation, the application of general principles of law and, in particular, fundamental rights, the principles governing the rule of non-discrimination in the Convention and the European treaties and so forth.

Previous meetings between these institutions took place in 1971 and 1973 in Luxembourg and Strasbourg. The usefulness of these contacts arises from the fact that both the Court of Justice and the institutions in Strasbourg are called upon in the context of different legal systems to protect fundamental rights and thereby to harmonize their conceptions and working methods in order to attain their common objectives.

Welcome by Mr Kutscher, President of the Court of Justice

Presidents,

Ladies and Gentlemen,

In the name of all the members of the Court of Justice of the European Communities I have the honour and great pleasure of wishing a very hearty welcome to the members of the European Court and Commission of Human Rights who have kindly accepted our invitation. The only regret I have is that such a lengthy period has elapsed before we could return to your institutions the hospitality which was afforded us in Strasbourg and of which we have retained such a pleasant memory. I seek consolation in the aphorism: better late than never!

It is hardly necessary to stress the importance of maintaining and indeed augmenting the contacts between yourselves and us since after our last meeting the problems of the protection of fundamental rights have been considerably more topical in the context of Community law. It is sufficient in this respect to refer to the Joint Declaration by the Parliament, the Council and the Commission of the Communities of 5 April 1977, a declaration in which these institutions solemnly stressed the prime importance which they attach to the respect of these rights. The Declaration moreover makes reference both to the European Convention on Human Rights and to the now established case-law of our Court.

Here then we are confronted with a common task. Our respective institutions have to fulfil this task in the context of different legal systems which have not been co-ordinated inter se. Obviously it is precisely this situation which justifies and indeed calls for our discussing in common the difficulties which could arise from it.

Original text : French

I am very happy that such a meeting can take place today and tomorrow. I assume that the papers which we are about to hear will not fail to deal with a series of aspects of the problem which I have just mentioned. But I do not wish to anticipate the matters which will be dealt with by the speakers. Our programme provides for three papers, which will be given by Judges Sørensen and Ganshof van der Meersch and by President Fawcett. With your agreement to this programme we can now begin.

Paper by Mr Max Sørensen, Judge of the Court of Justice, President of the Second Chamber

MEETING POINTS BETWEEN THE EUROPEAN CONVENTION CN HUMAN RIGHTS AND THE LAW OF THE EUROPEAN COMMUNITIES

The international debate on human rights is more lively than ever and new elements never cease to be added. One of these recent elements which interests us all and which constitutes an appropriate starting point for our exchange of views today is the Joint Declaration on fundamental rights adopted by the Parliament, the Council and the Commission of the European Communities and signed by the Presidents of these three institutions on 5 April 1977.

The content of this Declaration may be summarized as follows:

After referring to the fact that Community law, as the Court of Justice has recognized, comprises the general principles of law and in particular fundamental rights, and observing that all the Member States are Contracting Parties to the European Convention for the Protection of Human Rights, the three institutions "stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights ...".

Original text : French

The Declaration concludes by stating that the three institutions "in the exercise of their powers and in pursuance of the aims of the European Communities ... respect and will continue to respect these rights".

The legal scope of this Joint Declaration of the three Community institutions has been queried, since it is a measure which does not come within the categories provided for by the treaties establishing the Communities. Replying recently to Parliamentary Question No. 129/77 raised on this matter, the Commission referred to the support which the Declaration gives to the case-law of the Court on the subject and added: "The Declaration requires the institutions to attach prime importance to the protection of fundamental rights: in cases of doubt, this would lead them to interpret legal acts adopted by them in conformity with fundamental rights."

This assessment is no doubt correct. To go further is risky. In any event the Declaration does not mean that the Communities as such have become or claim to have become Contracting Parties to the Convention for the Protection of Human Rights (hereinafter called "the Convention"), something which is moreover ruled out by the very terms of the Convention; nor is the Declaration the equivalent of a formal incorporation of the Convention into Community law.

2. Both before and after the adoption of the Joint Declaration, Community law and the Convention constitute two distinct legal spheres and the procedures provided to ensure respect for these laws are mutually independent.

This dualism however does not prevent the two spheres from meeting, touching and sometimes partially overlapping. The explanation for this is quite simple. The Convention in laying down individual rights which each contracting State is bound to recognize as enjoyed by everyone coming under its jurisdiction circumscribes the exercise of public authority. The European Communities, for their part, and in particular the Economic Community to which I will confine

myself in what follows have been given a share of the public authority exercised by the Member States vis-à-vis their nationals. The Court of Justice in one of its dicta which has become classic, has spoken of "a Community ... having ... real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community ... albeit within limited fields ..." (Case 6/64, judgment of 15 July 1964 Costa v ENEL [1964] ECR 585 at p.593).

In order to place the Convention in this context it suffices to observe that the exercise by the institutions of the Community of powers thus conferred is circumscribed and limited not only by the provisions of the EEC Treaty but also, as appears from the case-law of the Court referred to in the Joint Declaration of 5 April 1977, by the fundamental rights of individuals which may be deduced from the general principles of law and from the Convention.

3. The concept of general principles of law as a source of individual rights in the Community context is the creation of the Court but may be regarded as inherent in the very logic of the Community system. The powers conferred on the Community institutions cannot in all logic exceed those of the national legislatures. In so far as national constitutions impose by their list of fundamental rights restrictions on legislative power, similar restrictions must be respected by the Community institutions in exercise of the powers which have been conferred on them. It is true that in the sphere of fundamental rights the Court has not expressly based itself on this doctrine of transfer of powers, but in fashioning the concept of "general principles of law" it has adopted a method which leads to the same result. It has directed itself towards an optimal standard and has respected those fundamental rights which are guaranteed by only a limited number or even by a single one of the national constitutions. Anxious to avoid conflicts between

the national systems of constitutional law and Community law, the Court has at the same time avoided the difficulty of putting the principle of the primacy of Community law to the test.

4. This recourse to the general principles of law to circumscribe the powers of the Community institutions has been completed, as already mentioned, by the reference to the Convention.

The doctrinal basis for doing this is quite clear and simple, in any event in the present state of the case-law. At present the nine Members of the Community are all Contracting Parties to the Convention and bound by its provisions. If in the performance of the obligations arising from such a multilateral Convention, the Community is substituted for the Member States, the Community as such is considered to be bound by these obligations. In other words the powers of the Community in matters concerned with the performance of international obligations assumed by Member States are themselves subject to those obligations. Whatever the solution which in international law arises from the principles of succession, the Community cannot disregard the obligations of its Member States in international law.

5. At this point in our analysis of the relations between Community law and the Convention we are confronted with the crucial and, in a way, even preliminary question whether the powers given to the Community, concerned as they are basically with economic matters, are really such as to bring into question the individual rights and freedoms defined by the Convention. Is the power to regulate economic activities capable of affecting the liberty of the subject, private and family life, freedom of thought, conscience and religion, freedom of expression, freedom to receive and impart information and so forth? Is not one of the characteristics of the present situation, on the contrary, that the Community is not, or is not yet, a political union whilst the Convention for its part does not cover economic and social rights, apart from the right to property referred to in Article 1 of the Protocol?

It is true that any answer to these questions must accept that Community law and the Convention diverge and clearly differ with regard to their objectives and the subject matter dealt with. This is a fundamental fact. Nevertheless there is no complete separation. There is no impenetrable barrier between the two spheres but on the contrary points of contact where they meet.

These points of contact are of two kinds, some of a marginal nature others concerned more closely with fundamental legal phenomena of our contemporary society.

I will consider in the first place what I call the marginal questions.

6. The Community exercises powers under regulations over its officials and other servants. Just like Member States with regard to national civil servants the Community must respect their fundamental rights.

In a recent case (Case 130/75 Prais v Council [1976] ECR 1589) it was recognized that the Community had to respect the right to freedom of religion enshrined in Article 9 of the Convention. When a competition is being held for the recruitment of officials the institutions should on principle avoid organizing tests on a date when a candidate would be prevented from taking part because of his religious convictions subject however to the authorities organizing the competition having been informed in due time of such an impediment, something not done in that case.

The right of association, or more particularly the right to join a trade union, as defined in Article 11 of the Convention may also come into question and we have seen in regard to a case relating to a scientific worker of Euratom that the question of freedom of expression of an official may arise.

These examples thus disclose a point of contact. It should be noted in passing however that there is a similar point of contact in the relations between the Convention and the law of other international or at least European organizations which are also required in the context of international public administration to respect the fundamental rights of their officials.

7. In passing from this specific sphere to the powers of the Communities in their own sphere vis-à-vis the nationals of the Member States it is possible to discern certain other actual or potential points of contact.

The future no doubt holds for us quite a number of difficulties in the sphere of the freedom to receive and impart information provided for in Article 10 of the Convention. We know how in our part of the world the communication of information by the press and to a lesser degree by electronic means is a function of private enterprise and forms part of economic and commercial activities. To regulate competition in this sphere in terms both of economic factors and the freedom of information will not always be an easy task. The cases which we have had both in Strasbourg and Luxembourg relating to cable television have given us only a slight foretaste of the problems which are going to arise.

8. Returning to every-day matters we find points of contact in the sphere of migrant workers. Although originally the EEC Treaty conceived "the free movement of workers" from a basically economic aspect, subsequent developments have stressed the social and human aspects. It is true that the most important questions such as the right of residence in the host State, conditions of employment, social security, housing and the educational system for children are outside the scope of the Convention. Nevertheless other questions concerning migrant workers could bring into question the rights defined by the Convention such as respect for private and family life guaranteed by Article 8. The same could happen regarding certain guarantees provided for under Article 6 as regards procedure in criminal cases.

9. The problems of migrant workers have enabled us to observe how in practice Community law interferes with the Convention.

The following is the procedure in a typical case. The worker alleges that a measure taken in respect of him by the authorities of the host country infringes his rights under Community provisions and the Convention. A case is brought and the national court makes a reference to the Court of Justice for a preliminary ruling on the interpretation or validity of the provision of Community law in question. The Court considers the problems of interpretation or the question of validity on the basis not only of actual Community law, including the general principles of law, but also where appropriate of the Convention as involving international law which the Community is bound to respect. Its reply to the question referred for a preliminary ruling thus takes account of the Convention and this reply is binding on the national court which finally gives a ruling in the action brought by the worker.

If however, at this stage, the individual considers that his rights under the Convention have been infringed, it is open to him, after exhausting national avenues of appeal, to bring the matter before the Commission, provided that the State in question has recognized the right of action for a private person under Article 25.

To my knowledge this last step (appeal to Strasbourg after a reference for a preliminary ruling to Luxembourg) has not so far been taken. It appears to me very unlikely that it ever will be but the possibility must be recognized as existing in principle.

10. The examples cited show the circumstances in which the Court of Justice may be called upon to interpret and apply the Convention. Seen from the perspective of the Convention this does not seem to me in any way extraordinary. Vis-à-vis the institutions at Strasbourg the Court of Justice is in a position comparable to that of national

courts. The national case-law on the Convention is already copious. A contribution from the Court of Justice would not be I hope unwelcome. In any event it is apparent that the last word on the questions of interpretation relating to the Convention will always rest with the Court of Human Rights.

11. I could continue at length on the examples and the hypotheses of what I have called the marginal points of contact. But I prefer to consider the more fundamental points of contact.

It is no longer a question of situations where the same facts may simultaneously be classified under one or other category of rules. I have in mind certain general concepts and methodological attitudes which are common to the two systems. It is possible to speak of common doctrines.

The example which comes immediately to mind is the doctrine of discrimination. There is no need to mention the focal position occupied by the different prohibitions on discrimination in Community law and in the Convention. The formulation of the concept of discrimination by the Commission and the Court of Human Rights as a result of the work done in the United Nations and in the context of national legal systems has striking parallels in Community law. The formula adopted by the court in the Belgian language case has left its mark on the case-law of the Court of Justice. I have in mind especially the following passages from the judgment of 23 July 1968:

> "... the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in

the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized."

12. Another example, this time derived from a doctrine in process of formation rather than already well worked out is the phenomenon which in German is called the "Drittwirkung", that is to say the restrictive effect on certain natural or legal persons of provisions which by their context appear to be addressed only to State authorities.

This was the view taken by the Court of Justice in Case 36/74, Walrave and Koch v Union Cycliste Internationale and Others [1974] ECR 1405. In reply to the question whether the rules of a sporting federation could be regarded as incompatible with the provisions of the EEC Treaty on the free movement of persons and the freedom to provide services, the Court held that the prohibition on discrimination in this sphere applies not only to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services. The Court said that the objective of the Treaty would be compromized if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law.

The problem has been raised before the Commission and the Court of Human Rights by cases concerned with Swedish trade unions. The Court, following the Commission on this point held that Article 11 of the Convention on Human Rights concerning freedom to form and to join trade unions applied to States not only in the exercise of public authority but also as employers. The Court added however that it did not think that it had to give a ruling on the direct or indirect applicability of Article 11 as between individuals stricto sensu. The question therefore remains open.

The power of professional and trade union organizations in our society is an accepted fact. To circumscribe the exercise of this power to protect the rights of the individual may be necessary. It appears to me highly desirable that in such a matter our respective courts should adopt similar solutions.

13. I come finally to the most difficult problem in my opinion in relation to the protection of fundamental rights, a problem which arises in similar, if not identical, terms in Community law and in the Convention on Human Rights. I refer to the restrictions and limitations on individual rights and freedoms.

The various instruments require us to recognize the existence of such restrictions and limitations. Are there, outside those instruments, limitations inherent in certain legal relationships in our society? The Commission and the Court of Human Rights have recently considered this question in relation to military service.

Following the general principles of law the Court of Justice for its part has observed that the right to property and the freedom to work are only guaranteed subject to the limitations provided for in the public interest. Moreover in many cases relating to the free movement of persons the Court has had to consider the concept of "public policy" and the limitations which it could justify according to the Community rules. It has stated that the Convention also uses this concept, but to justify only those restrictions which constitute necessary measures in a democratic society.

Examining this last criterion more closely the Court of Human Rights in the Handyside case set out important considerations which, while directly concerning only freedom of expression, go further. I really must cite them verbatim:

"The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.

From another standpoint, whoever exercises his freedom of expression undertakes 'duties and responsibilities' the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person's 'duties' and 'responsibilities' when it enquires, as in this case, whether 'restrictions' or 'penalties' were conducive to the 'protection of morals' which made them 'necessary' in a 'democratic society'." (Judgment of 7 December 1976, para. 49).

14. From these words and many others which our respective courts have used in relation to the fundamental rights of the individual we see a phenomenon revealed which is common to us and which in the last analysis is the most important meeting point. The application of the law is not an automatic or mechanical process. It involves choices determined by value judgments.

President Wiarda in a study published some fifteen years ago referred to the three types of legal activity described by Montesquieu. In republics, said Montesquieu, law is perfect and complete, judges "are only the mouthpieces which pronounce ... beings which can moderate neither the force nor the rigour of it". The opposite pole is the despotic State where there are no laws and where "the court is a law until itself". Between these two extremes there are constitutional monarchies: "There is a law; where it is well defined the judge follows it; where it is not he looks for its spirit".

Whether we are republicans or monarchists we must recognize, I think, that the judicial functions entrusted to us come essentially under the last category. Where there is imprecise wording we must look for the spirit of Community law and of the Convention. Whether the task is tackled in Strasbourg or Luxembourg the spirit is the same. To translate this spirit into legal decisions is a formidable task from the angle of the "Nine" as from that of the "Nineteen". If we do not succeed in the spirit of the instruments in establishing an equilibrium between freedom and discipline, between rights and duties of individuals towards society the future of our western civilization is perhaps at risk.

15. We need to help one another, consult one another and to act together. This process has given rise to much thought at an academic level. The publication due soon of the symposium organized by the Max Planck Institute in Heidelberg last year will bear eloquent witness to it. Plans multiply, going as far as providing for the institution of procedures for references for a preliminary ruling between the two Courts. At our level preference ought perhaps to be given to more simple and thus more realistic means. To improve the reciprocal information between our secretariats, registries, and research and documentation departments and at an unofficial level between the members of our institutions, would constitute a first step. And why not provide in future, when our other engagements permit, the organization of joint discussions in the form of symposia or other informal meetings on selected topics such as discrimination, public policy and so forth.

Meeting points abound.

Paper by Mr Ganshof van der Meersch, Judge at the European Court of Human Rights

QUESTIONS OF COMMON INTEREST WHICH MAY FORM THE SUBJECT OF EXCHANGES OF VIEWS AND INFORMATION

A Preliminary considerations

1. The questions which are of such a nature as to concern both the Court of Justice of the European Communities and the European Court of Human Rights are many. Among them are certain areas in which harmonization is necessary. These questions concern the basic content of the law and, although they deal with respect for the human rights and fundamental freedoms which appear in the Rome Convention, it is for both Courts to protect the rights and freedoms which make up this common body of law.

Among those questions reference may be made to:

(i) the rule against discrimination;
(ii) the reservation based on public policy;
(iii) the principle of proportionality;
(iv) the general principles of law.

Those questions are capable of receiving separate and different interpretations in the case-law of the two Courts.

2. There are also problems - and clearly they are the main ones - of interpretation which arise before the two Courts both as to method and procedure.

In that area reference may be made to:

(i) the problems inherent in the teleological interpretation and in the evolutive interpretation;
(ii) the useful effect rule and the effictiveness rule;
(iii) the interest in a uniform interpretation and the strict or relative nature of that uniformity;
(iv) the reference for interpretation by means of a preliminary ruling;
(v) the legal basis for the protection of human rights by the Court of Justice of the European Communities.

·iginal text : French

3. From that brief list of a certain number of questions - which are far from being the only ones to demonstrate the area of interest common to the two Courts - it is clear that a satisfactory study of them cannot be made in the short time available. Thus, in the mind of the author, the aim of this paper is merely to indicate, for each question, the problems which appear to exist at present, to add a few brief remarks and some references to case-law. The author is purposely refraining from any consideration of legal philosophy, since he considers that the task which he has been asked to undertake is limited to drawing up a list on which the judges called upon to consider the questions referred to may reflect. It will be for the two Courts to decide on how the exchanges of views organized in 1973 and re-opened today are to be organized in future so as to enable the questions which they consider important to be studied. The author of the present paper expresses his personal wish that such exchanges of views may be organized on a permanent basis and as regularly as possible.

4. Before dealing briefly with the problems referred in paragraphs 1 and 2 of the present paper, I would like to make three observations which may perhaps explain generally certain differences of scope in the application of provisions or rules which normally derive from a single principle:

(i) The objectives of the Convention and those of the EEC (1) are fundamentally different: whilst the purpose of the Convention is to protect the individual against improper interference by governmental bodies within the Contracting States and, in special cases, to acknowledge certain positive duties which are incumbent upon the States (2), the intention of the Community, without prejudice to those of its aims which are of a social nature, is to modify the economic relationships between the Member States through the gradual integration of their economies and the pooling of certain of their powers and competences, so as to satisfy the common interests of the Member States and of their nationals. Furthermore, through the intervention of its institutions, it exercises powers which lead to the provision of "contributions" by the Member States and by individuals.

(ii) Because its objectives are principally economic in nature, the field of human rights dealt with by the Community appears less extensive than that covered by the Convention. Furthermore, the institutional system and the rules of procedure, as supplemented by practice, have established a balanced system of checks and counterposes which so far have only rarely given rise to disputes concerning the violation of human rights. In addition, the Court of Justice in Luxembourg deals with the matter from the point of view of Community law, while the Court in Strasbourg keeps its eyes firmly fixed on the national law. Finally, when the Court of Justice of the European Communities deals with human rights it does not do so as a direct result of the treatment meted out by the Member States to their nationals but rather in the process of assessing the effects of the measures adopted by the institutions, which are the agents of the central Community authority.

(iii) Nevertheless, the list of differences which I have just rapidly drawn up must not allow us to lose sight of the fact that the action which must result in the achievement of the objectives of the Community may be associated, in legal or factual situations which cannot be dealt with systematically here, with the field of human rights protected by the Convention. Apart from rights and freedoms of a strictly physical nature, those which cannot be called into question by the Community institutions, either in the field of legislation, or of the powers inherent in the Community, are rare.

Allow me to refer to the conclusive evidence on that point provided by a recent judgment of the Court of Justice, confirming the principle of respect for freedom of religion which the applicant maintained had been violated (3). Is it rash to believe that the same might apply, in particular, as regards respect for a person's private life, freedom of thought or expression, freedom to receive and impart information and freedom of association?

I shall moreover not lose sight of the vast social field - so close to the field of human rights - which has, until now, rarely been mentioned in an examination of these problems. Social integration is less advanced than economic integration and it is reasonable to think that important developments will take place in that sphere in the future. In that respect one cannot underestimate the ambitious programme outlined in the Preamble to the Treaty, the terms of which I should like to recall:

> "Resolved to ensure the ... social progress of their countries by common action to eliminate the barriers which divide Europe,
>
> Affirming as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples".

B Observations on certain questions which arise out of a comparison of the Treaty establishing the European Economic Community and the European Convention on Human Rights

(i) The principle that Community law shall be interpreted uniformly, to which reference has been made above, is linked in some measure to the rule against discrimination, laid down both in the Convention and in the EEC Treaty. Here again differences exist between the two systems.

In the Treaty of Rome the principle that there shall be no discrimination is laid down in relation to specific fields. It is acknowledged in Article 7 as regards nationality (4). It is laid down in Article 119 as regards the principle that men and women should receive equal pay. However, on a material level the Court of Justice recognizes the general nature of the principle. It considers that the rule must be applied to an assessment of any legal relationship (5). The Court confirmed that the principle is imperative and general in nature by referring to "equality of treatment" which is the positive concept corresponding to the rule against discrimination (6). It considers, however, that it cannot be discriminatory to apply, in its external relations, a positive rule of the Treaty to certain States and not to apply it to others (7). Obviously, it would be difficult to find similar situations within the sphere of application of the Convention on Human Rights, but one wonders whether the principle under which such a decision is adopted is not contrary to Article 14 of the Convention which,

as regards the rights and freedoms which it acknowledges, clearly establishes the general nature of the rule against discrimination on a geographical level. On the other hand, the Court in Strasbourg does not basically interpret the general principle against discrimination as strictly as does the Court of Justice of the European Communities. It has on several occasions set out its guiding principles on that subject, which are directly influenced by the foregoing consideration. It takes the view that the Convention does not allow the Court to "disregard those legal and factual features which characterize the life of the society in the State which, as a contracting party, has to answer for the measure in dispute" (8).

After stating in the Case relating to certain aspects of the laws on the use of languages in education in Belgium (9) that "Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognized", the Court of Human Rights took into account the fact that "the competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions", and concluded that it "holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification" and that "the existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies". It restated that position of principle in the judgment in the National Union of Belgian Police case (10), in which it referred to the text of its remarks in the aforementioned case after making the general statement that "it is not every distinction ... that amounts to discrimination". It returned to that point in the case of Engel and Others, in which it was claimed that the disciplinary rules inherent in military service involved discrimination. The Court stated that "such inequalities are traditionally encountered in the Contracting States and are tolerated by international humanitarian law" and concluded that "in this respect, the European Convention allows the competent national authority a considerable margin of appreciation". (11)

(ii) The reservation based on public policy, which involves a derogation from certain legal positions, particularly in the area of fundamental rights, is clearly stated by both Courts and, on that point again, different interpretations are made.

In the EEC Treaty the concept is formally expressed in Articles 48 (3) and 56, which concern free movement of workers and the right of establishment respectively. The reservation based on public policy is associated therein with the requirements of "public security or public health". The Court of Justice has held that "in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers" it "must be interpreted strictly" (12). It is, of course, for the Member State to determine the requirements of public policy referred to by the Treaty in order to justify a limitation on the principle of the free movement of persons which is a general principle of Community law and a fundamental right of the individual, but the concept of public policy must be assessed with reference to the Community legal order and not on the basis of the view taken by the national law of the State in question. Furthermore, the exception to the rule must generally be interpreted strictly. That is particularly true in the area of human rights and fundamental freedoms.

The concept of public policy, which appears in the form of a derogation from the guarantee which attaches to an individual right, is both narrower and more strict in the case-law of the Court of Justice than in the case-law of the European Court of Human Rights. Like the European Commission of Human Rights, the latter allows the Contracting States a fairly wide area of discretion as regards the concept of public policy in their national law. It must not be forgotten, however, that each time that the derogation appears, it must be assessed within the limits to which it may go "in a democratic society", which reduces its field of application socially, politically and legally. That general limit on any derogation from the principle of the protection of the rights and freedoms laid down in the Convention is directly echoed in the Preamble to that document, which refers to "an effective political democracy".

"Public policy" is not expressly referred to in the Convention (13). However, the concept of the general interest, elevated to the level of a mandatory requirement, as a result of which it comes near to the concept of jus cogens in international law, appears in several of the articles of the Convention in the form of descriptive references (14). Those references include "national security", "public safety", the "economic well-being of the country", the "prevention of disorder or crime", the "protection of health or morals" and the "protection of the rights and freedoms of others". The Contracting Parties considered those matters to be so vital to the general interest that they allow of restrictions on certain specific freedoms provided for in the Convention, provided always that such restrictions are "necessary" in a democratic society. The questions whether those interests are such as to justify the derogations and whether the derogations are necessary are assessed by reference to national law and to the situation existing within the State or States in question.

(iii) We touch here on one of the many forms in which the general principle of proportionality appears in the application of the Convention.

In the Community legal order the principle of proportionality is the duty to maintain due proportion between the reaction of the Community authority and the unlawful action which gives rise to it (15). The Court of Justice expressed its view in the judgment in Hauts Fourneaux de Chasse, when it stated that the High Authority could not "ignore the special interests of those concerned and act so harshly that those interests are compromised very much more than can reasonably be expected". It "is bound to act with all the circumspection and care required to balance and assess the various, often conflicting, interests involved and to avoid harmful consequences in so far as, within reason, the nature of the decision taken permits" (16).

However, situations also exist in which the principle has appeared less clear and systematical. Thus, the Court has drawn attention to the obligation on the Council (or the Commission) to make an overall assessment of the various advantages and disadvantages of measures to be introduced in relation to the individual circumstances of particular sectors of activity, as well as to take account of the multiplicity of individual economic situations (17).

The European Court of Human Rights has also referred on several occasions to the general principle of proportionality. It has done so chiefly in relation to the prohibition of discrimination, that is, by associating it with Article 14 of the Convention. The Court explained what it understands by the requirements of proportionality in relation to that subject when it stated in the Belgian language case that "a difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aims sought to be realized" (18). However, the Court of Human Rights has also looked to the general principle of proportionality when fixing the limits of the derogations from the principles of freedom of expression and freedom to receive and impart information (Article 10 (2)), when it is required to assess "necessary measures" (19) and when defining the exceptions to the obligations for which the Convention provides "in time of war or other public emergency threatening the life of the nation", provided that they are "strictly required by the exigencies of the situation" (20).

Although the general principle of proportionality is applied on different levels by the two Courts, it is interpreted in ways which are very similar and appear to be inspired by the rule of reasonableness in the common law.

(iv) The Court of Justice frequently calls in to the general principles of law as a source of Community law and these also guide it in the interpretation of Community law. From surveys of the case-law of the Court of Justice one can apparently, even without being too systematic, distinguish three categories of general principles: first, those which are common to all legal systems, secondly, those which derive from the

law of the Member States and, thirdly, the general principles of Community law stricto sensu. The first are to be found on a universal level. Those which fall into the second category are taken from the internal law common to the Member States and, in the process of fusion into Community law, stripped of their national elements. They are also to be found in the international undertakings entered into and ratified by all the Member States. Finally, the general principles of Community law are inherent in that law. They are deduced from a certain number of specific rules which expressly or impliedly reside in the Treaty itself, such as, in particular, the principles of solidarity of the Member States and of the unity and effectiveness of Community law.

The Court of Justice considers that the general principles of law are suppletive in nature. They are suppletive in relation to the terms of the Treaty, in their context and the light of its subject-matter and object (21). As Mr Advocate General Dutheillet de Lamothe stated in his opinion before the Court of Justice: "it is good judicial technique to apply unwritten law only in cases of obscurity, insufficiency or gaps in the written law" (22). It appears prudent to add: subject to jus cogens.

Although the Court of Justice of the European Communities frequently calls in the general principlies of law, which have helped to give its case-law its admittedly progressive and dynamic character and the study of which is outside the scope of this paper, the Court of Human Rights has so far made less use in its decisions of that technique of legal evolution. I will nevertheless give a few examples of its recourse to that principle. In the Golder case, the Court of Human Rights referred both to the general principle of law "which forbids the denial of justice", which it described as a principle of international law, and to the "principle whereby a civil claim must be capable of being submitted to a judge", which "ranks as one of the universally 'recognized' fundamental principles of law" (23).

In the Handyside case the Court of Human Rights invoked the general principle "common to the Contracting States, whereunder items whose use has been lawfully adjudged illicit and dangerous to the general interests are forfeited with a view to destruction" (24). Finally, as has already been stated, the Court refers in several judgments to the general principle of proportionality (25). Let me also refer to the De Wilde, Ooms and Versyp case (vagrancy), in which the Court refers on three occasions to the general principles of international law. On the first occasion it states that the rule of exhaustion of domestic remedies is also one of the generally recognized principles of international law, to which Article 26 makes specific reference (26). It then states that "there is nothing to prevent States from waiving the benefit of the rule of exhaustion of domestic remedies ... . There exists on that subject a long-established international practice from which the Convention has definitely not departed as it refers, in Article 26, to 'the generally recognized rules of international law'" (27). Finally, it states that "under international law, to which Article 26 makes express reference the rule of exhaustion of domestic remedies demands the use only of such remedies as are available to the persons concerned and are sufficient, that is to say, capable of providing redress for their complaints ... . It is also recognized that it is for the government which raises the contention to indicate the remedies which, in its view, were available to the persons concerned and which ought to have been used by them until they had been exhausted" (28).

It appears that the case-law of the European Court of Human Rights is gradually going further than the case-law of the Court of Justice in Luxembourg in its application and interpretation of a Convention which, like the Treaty establishing the European Economic Community, contains a large number of rules which are formulated very widely and which frequently call in concepts which are themselves not very clear and which leave a wide area of discretion to the Court in looking to general principles of law.

However, when comparing the case-law of the two Courts, I shall not lose sight of the fact that the range of the general principles of Community law does not coincide with that of the general principles of law to which the Court in Strasbourg looks or might look. In fact, although the general rules of international law form part of the law applied by the Court implementing the Convention, the same does not apply to the general principles of Community law, which are generally specific in nature, and it cannot apply to the general principles common to the Member States of the European Communities, since that body today numbers nine States, whilst nineteen States have signed the Convention or have adhered thereto.

C Observations on the methods of interpretation of Community law and of the European Convention on Human Rights

(i) The works and studies which have dealt with the methods of interpretation of the Court of Justice of the European Communities are many and there can be no question here of making even a summary of them. The lawyer who wishes to have an overall view of their trends and original features has the inestimable privilege of being able to consult Mr President Kutscher's study of the subject entitled "Methods of interpretation as seen by a judge at the Court of Justice" (29). The author has performed the extraordinary task of outlining, in 50 pages, the main features of the subtle and delicate area which makes up the body of the methods of interpretation applied by the Court, of synthesising them, of deriving the principles from them and of placing those principles in the context of the case-law of the Court, without losing any precision in the analysis.

The expression "the body of the methods of interpretation used by the Court", employed by the author, will perhaps be found surprising. It is, nevertheless, correct. Even when it remains within the context of Article 31 of the Vienna Convention, the Court of Justice of the European Communities has various methods of interpretation to hand (30). When dealing with questions of Community law it puts the accent to a greater or lesser degree on one or other of the elements which that article of the Convention lists to guide it in its interpretation of the Treaty.

Thus, the Court does not disregard, as the case may be, the grammatical interpretation (31), or the interpretation based on the usual meaning of the words (32), or the context in which the words to be interpreted appear (33), but it will pay greater attention to the object and the aim of the Treaty since therein lies the special nature of Community law. It is, furthermore, to be observed that it holds aloof from the literal interpretation and the historical interpretation.

In this paper I shall merely make certain observations on the method of interpretation which looks at the aim of the law, on the evolutive method and on the useful effect method, three subjects which appear to be of interest to both Courts.

(ii) The desire of the contracting States to create a Community leading to economic and social integration as well as to gradual legal integration is to be seen not only in the objectives assigned to the institutions by the Treaty but also in the institutional system in the Community. Thus, the Court of Justice has expressly referred on several occasions to its duty to interpret the provisions of the Treaty and the measures adopted by the institutions in the light of their "objectives" (34) or of their "purposes" (35). The principles which guide the Court of Justice in its interpretation are essentially intended to satisfy the desire to give Community law an independent existence according to the objectives of integration.

The judgments in Van Gend en Loos (36) and Costa v Enel (37), referred to as "leading cases" in Community law, are too well known to call for any restatement showing where and how they exemplify the special nature of Community law. The interpretation which looks at the aim of the law, or teleological interpretation, that is, the one which looks at the object and aims (38) of treaties or of the terms thereof, is chiefly applied in treaties of a legislative nature and, even more, in treaties establishing an international organization. It is particularly important as regards the Treaties establishing the European Communities, which are intended to bring about gradual legislative and institutional integration and are a fundamental element of the special nature of Community law. I would like to refer to only two of the most authoritative observations to which that method has given rise: the first emanates from Judge Pescatore,

who writes that "the Communities are entirely based on the concept of objectives to be attained" (39); the second is by Judge Monaco, who, referring to the dynamic interpretation of the EEC Treaty, writes that the Court of Justice makes a teleological reconstruction of the meanings of the rule (40). We must also not lose sight of the fact that, in the interpretation of the Treaty and of the measures adopted by the institutions, the special nature of Community law prevents the Court of Justice from applying the rule of international law according to which "limitations on the sovereignty of the contracting States are in case of doubt to be interpreted narrowly" (41). The treaties establishing the Communities are treaties of integration under which the Contracting Parties, adopting progressive aims, have agreed to the pooling of state powers and common interests.

(iii) The Court in Strasbourg also uses methods of interpretation which look at the object and aim of the Convention (42). Its case-law, however, has a less "dynamic" quality than that of the case-law of the Court of Justice in Luxembourg. Moreover, as has been said, the objectives of the Treaty of Rome and those of the Convention are quite different: the former seeks to bring about gradual legislative integration - both economic and social - as well as integration of institutions by legislative means, whilst the latter aims at protecting human rights and fundamental freedoms. It must not, however, be forgotten that the acknowledged aim of the Convention, the initiative for which was taken by the Council of Europe, as described in the Preamble to the Statute of that body, is not only the "maintenance" but also the "further realization" of human rights and fundamental freedoms.

The subject of human rights is not static. It is essentially dynamic in nature and the Contracting States have been careful to say so and to recommend that attention be paid to this fact (43). It is all the more irreconcilable with immobility in that many of its terms refer to extremely wide and sometimes indefinite non-legal concepts which increase the role played by case-law and, therefore, of judge-made law, which is chiefly to be found in internal constitutional law and in the law of international organizations. In that way there is an affinity with Community law.

As regards the interpretation of Community law Mr President Kutscher writes "the rule must be understood in connexion with the economic and social situation in which it is to take effect" (44). As regards the Convention the same may be said of the national and social context which form the background to the situations with which the Court in Strasbourg has to deal.

(iv) The interpretation which looks at the aim of the law is directly linked to an evolutive interpretation. That is no doubt why Mr President Kutscher does not include the evolutive interpretation among the "autonomous" methods of interpretation with which he deals (45), even though it is mainly to be found in the judicial and academic interpretation of Community law (46).

In a paper dealing with the evolution of the rights contained in the European Convention on Human Rights (47), Judge Sørensen writes, logically, that it emerges from the text itself of Article 31 of the Vienna Convention "that the ordinary meaning of a term at the time when the Treaty was concluded does not necessarily prevail over the modified or developed meaning which the same term may have acquired between that time and the time when it must be applied" (48). From the point of view of an analysis of Article 31 of the Vienna Convention that is an important assertion. The social context from which both an international agreement and internal law draw their inspiration and justification is alive and reacts directly on the legislative system, in particular, on the system of fundamental rights. To a large extent the aim and objectives of the Convention are concepts which take shape gradually, that is to say, they are evolutive (49). That view is reconcilable with the rules for the interpretation of Article 31 of the Vienna Convention, which does not require the elements listed in the first paragraph thereof to be in any way immutable. As Judge Sørensen writes, the interpretation of the provisions of the Convention is capable of introducing "an element of dynamism and of gradual evolution, following the tempo of the general evolution of society ... on the basis of the generally accepted and acknowledged legal and judicial methods" (50).

(v) The rule of interpretation known as the useful effect rule also has clear links with the method of interpretation which looks at the aim of the law. It is not limited to the interpretation of either Community law or of the Convention. It is one of the rules which are common to the interpretation of international undertakings. It is often applied in international law and raises no special problems as regards the interpretation of the Convention.

The first requirement of that rule concerns the preference to be given to the interpretation of a legislative provision which gives a meaning to that provision rather than to an interpretation which has no meaning. The International Court of Justice has referred to the rule on several occasions, in particular in the Corfu Channel case, when it stated that it would be "incompatible with the generally accepted rules of interpretation to admit that a provision ... occurring in a special agreement should be devoid of purport or effect" (51).

The Court of Justice of the European Communities, which has on several occasions applied the useful effect rule, is of more immediate concern to us.

In Community law, as in international law, the useful effect rule is applied in varying degrees. The Fédéchar judgment is evidence of that. In that judgment the Court of Justice refers to the rule of interpretation "according to which the rules laid down by an international treaty or a law presuppose the other rules without which that treaty or law would have no meaning or could not reasonably and usefully be applied" (52). Similar terms are to be found in its judgments in Government of the Italian Republic v High Authority (53) and Government of the Kingdom of the Netherlands v High Authority (54), both of which were given on 15 July 1960.

In the past, the Court of Justice has applied the rule without referring expressly to the term "useful effect", by looking sometimes to considerations which gave a somewhat subjective air to its judgments. Thus, in the Algera judgment of 12 July 1957, the Court states that the

applicants' interpretation "would lead to an absurd result" (55) and in the Storck judgment of 4 February 1959, it states that "that interpretation alone /the interpretation to which the Court's reasoning leads/ avoids the unsatisfactory situation described above" (56).

Moreover, on several occasions the Court of Justice countered the methods of interpretation which the parties have put forward with the need to prevent the provision subject to interpretation from losing its "useful effect". This was done, in particular, in two relatively recent cases, Reyners (57) and Van Binsbergen (58), in which the Court was required to interpret Articles 55 and 59 of the Treaty respectively. It was done also in the Van Duyn judgment of 4 December 1974, in which the Court stated that "the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts" (59). In the latter case the Court took a step further: it stated that the useful effect required of the interpretation does not solely consist in not "weakening" the scope of the directive; it brings about the necessary "efficacity" or "effectiveness" of the rule laid down in the measure.

In the Community system the useful effect rule assumes proportions different in scope and importance from those in international law. It goes beyond a rule of interpretation and is raised to the level of a general principle of Community law, associated with the substance of the law. The principle is assessed and applied by the Court of Justice by reference to criteria based on the objectives of the Treaty, which confers upon it the necessary objectivity. The interpretation accepted must be the best adapted to the achievement of those objectives, which, by a logical sequence, connects the useful effect rule to the teleological method of interpretation and thus justifies the reference to the useful effect rule in this paper.

The Court of Human Rights has scarcely ever referred expressly to useful effect rule, except in the Belgian language case (60), in which it was required to interpret the phrase "the right to education" (61). It

did so by stating that in order for that right "to be effective, it is ... necessary that ... the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State ..., official recognition of the studies which he has completed". That was indeed an application of the useful effect rule pure and simple.

It would be difficult to draw a systematic distinction between the useful effect rule and the rule that Community legislation must be effective, which may be regarded as a refinement of the former. Apart from the exceptional case in which a contrary intention is formally expressed, the Court of Justice comes to its decision by reference to a result which the Treaty seeks to achieve. The institutional system of the European Communities reveals the essential place in the Community legal order of the machinery designed to make the action of the institutions effective.

Obviously, the Convention does not contain any provision analogous to Article 5 of the EEC Treaty, any mandatory procedure such as that provided for in Articles 169 to 171 of the Treaty or compulsory procedure for interpretation, but the concern of the Court of Human Rights about effectiveness has been clearly expressed on several occasions in its case-law (62).

(vi) The Court of Justice of the European Communities took a further step when, in order to justify its interpretation, it referred formally to the "necessary" effect of that interpretation in order that the Treaty should be applied: the interpretation is vital if the objectives of the Treaty are to be achieved. The first expression of that view in the case-law appears in the judgment in De Gezamenlijke Steenkolenmijnen in Limburg v High Authority, in which the Court stated that Article 67 of the ECSC Treaty "is intended to enable the jurisdiction of the Community to impinge on national sovereignty in cases where, because of the power retained by the Member States, this is necessary to prevent the effectiveness of the Treaty from being considerably weakened and its purpose from being seriously compromised" (63).

The same reasoning appears in Costa v Enel, in which the precedence of Community law is justified on the ground that "the executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty ..." (64).

The celebrated judgment of 31 March 1971, given in Commission of the European Communities v Council of the European Communities, known under the initials AETR, appears to mark the final stage in the development of that case-law. The idea is expressed therein in the following manner:

> "Although it is true that Articles 74 and 75 do not expressly confer on the Community authority to enter into international agreements, nevertheless the bringing into force ... of Regulation No. 543/69 of the Council ... necessarily vested in the Community power to enter into any agreements with third countries relating to the subject-matter governed by that regulation. ... These Community powers exclude the possibility of concurrent powers on the part of Member States, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law". (65)

That is a decisive stage in the development of the methods of interpretation of the Court of Justice, which had been prepared by several earlier judgments. It goes beyond the usual rules of interpretation of international law and is justified by the principle of the evolutive and progressive interpretation of an incomplete Treaty, every provision of which is a reminder that it is intended to lead to integration. I cannot deny myself the pleasure of quoting here the observations of Mr Boulouis and Mr Chevallier on that subject. They write: "Although the treaties fixed certain objectives and although, for a certain period, it appeared reasonable to interpret their provisions on the basis of those objectives, which were regarded as aims to be achieved, that view could not be applied indefinitely. That premise, which was deduced from the provisions of the treaties by the method which looks at the aim of the law and the useful effect principle, was to form the starting point of a process of reasoning which would end in producing the required effect" (66).

The Court of Human Rights has not taken the interpretation dictated by its effectiveness to the extreme required by the special character of the objectives of Community law regarding integration. It has remained more closely associated with international law and its methods of interpretation and has allowed itself to be guided by the rule of the useful effect of the provision interpreted, sometimes known as the "rule of the effectiveness of the treaty" (67), as accepted in international law, but will not go beyond, rectify or supplement a treaty by means of the process of interpretation (68). As I have said (69), it only referred to that rule once, namely when it stated that the right to education "would be meaningless if it did not imply in favour of its beneficiaries the right to be educated in the national language or in one of the national languages, as the case may be". However, the Court of Human Rights has frequently referred by implication to the useful effect rule. Thus, in the Golder case, concerning procedural guarantees in a pending lawsuit, the Court said, in relation to the right of access to a court, "The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings" (70).

(vii) In principle, "disputes to which the Community is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States" (71). That rule on jurisdiction may give rise to divergencies in the interpretation of Community law. The reference to the Court of Justice of a question for a preliminary ruling (72) and the action against States for failure to fulfil their obligations (73) enable the Court, which "shall ensure that in the interpretation and application of this Treaty the law is observed" (74), to preserve the unity of Community law, in particular as regards the determination of the rights and obligations of the Member States and of their nationals. The safeguarding of that unity, which must be assessed from the point of view of Community law and not from the point of view of national law, is one of the fundamental principles of the law of the European Communities.

Of course, as regards the States and their courts, the case-law of the Court in Strasbourg has a regulatory and unifying effect on the interpretation of the Convention on Human Rights. However, the Court of Human Rights does not consider that the jurisdiction conferred upon it by Article 48 of the Convention obliges it to impose legal uniformity by requiring each State to behave in the same way as regards respect for the rights guaranteed by the Convention. On that point there is an appreciable difference between the two systems. In the Belgian language case, the Court stated that respect for the Convention does not allow it to "disregard those legal and factual features which characterize the life of the society in the State which, as the Contracting Party, has to answer for the measure in dispute". In doing so, the Court cannot "assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention" (75). It made the same statement again in similar terms in the Handyside case, when it added that "The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms which it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted" (76).

The Court and the Commission of Human Rights allow the Contracting States an area of discretion in the application of the Convention on the basis of their national laws. The Court of Human Rights has been careful to state this on several occasions (77).

(viii) Since that distinction is capable of giving rise to or of introducing doubts into the area of human rights, does it not militate in favour of the adoption of an optional procedure by which the national courts may refer questions on the interpretation of the Convention and on certain of its additional protocols to the Court of Human Rights for a preliminary ruling? Many variants of the system established by Article 177 of the Treaty of Rome, which has contributed under particularly favourable conditions to the harmony and development of Community law, might be considered. Among all those variants, the advisory opinion, which would reconcile procedures for which there are useful precedents both in the rules laid down in conventions and in practice, is about as far as it would be possible to go (78).

(ix) On several occasions since 1969 (79) the Court of Justice has confirmed that it protects fundamental rights (80). Its confirmation was accompanied by a two-fold reservation. The first reservation was immediately apparent since it concerned the legal justification for that confirmation, which is that fundamental rights are "included among the general principles of Community law". The second may be inferred from a certain ambiguity which was apparently intentional: the rights in question are not necessarily general fundamental rights: but are those "protected by the Court". The protection of those rights will be ensured "within the framework of the structure and objectives of the Community".

From a literal point of view, both the wide interpretation and the interpretation which is limited to specific fundamental rights are acceptable but it is self-evident that if one were to adopt the latter interpretation there is not a national or Community judge who would today be in a position to fix a clear limit to the area "protected" by the Court of Justice.

The concept of the general principles of law, applied to fundamental rights, offers an advantage which I find difficult to dispute: it is an extremely flexible concept and one which may gradually be broadened. It leaves the court the power to decide on the rights which are "fundamental" in a democratic society. The general principles of law in that area are deduced from the written and unwritten constitutional laws common to the Member States and detached from their national contexts. In the latest development which has taken place in the case-law of the Court of Justice they are also deduced from the international instruments on the protection of human rights to which the Member States are signatories (81). The Court has advanced further in that area by referring directly to the European Convention on Human Rights. In the Rutili judgment, which concerned the justification for limits placed "on grounds of public policy" on the free movement of workers, the Court referred expressly to the limits laid down by the European Convention for the Protection of Human Rights and made the point that it had been ratified by all the Member States (82). As explained in the first part of this paper, the Court

of Justice assimilates the restrictions necessitated by public policy to the limitations provided for by the Convention in the second paragraphs of Articles 8, 9, 10 and 11, which it regards as "a specific manifestation of the more general principle" (83).

It can be seen that a gradual convergence is taking place in the case-law of the two Courts as regards both the protection of fundamental rights and the "necessary" limitations or restrictions in a democratic society in which human rights are bound up with "the duties and responsibilities" which a man assumes in society (84). The concept of duties and responsibilities, expressly referred to in Article 10 (2) of the Convention, underlies the expressions "protection of ... morals" and "protection of the rights and freedoms of others" to be found in the second paragraphs of Articles 8, 9, 10 and 11 of the Convention.

It is for the Court of Justice to consider both whether it ensures protection of human rights and also the restrictions which may be placed thereon, not only in the light of the text of the Treaty and the general principles of law but also by reference to undertakings governed by international law which are binding on the Member States and which the Community is obliged to respect (85). It is, clearly, also for it to decide on the significance of the declaration made on 5 April 1977 by the Assembly, the Council and the Commission of the European Communities (86).

(1) In order to simplify matters in the context of the Community legal order only the Treaty establishing the European Economic Community in which the problems in question are most clearly raised will be considered and as regards the Court in Strasbourg reference will only be made to the Convention leaving aside for the moment the additional protocols.

(2) Cf. Article 11 of the Convention which guarantees everyone "the right to form and join trade unions for the protection of his interests." Cf. Eur. Court H.R. National Union of Belgian Police case, judgment of 27 October 1975, Series A, Vol. 19, pp. 17-18, paras. 38-39 and p.20, para. 45; Swedish Engine Drivers' Union case, judgment of 6 February 1976, Series A, Vol. 20, pp. 14-17, paras. 39-40 and 45; Schmidt and Dahlström case, judgment of 6 February 1976, Series A, Vol. 21, p.16, para. 36 and p.17, para. 39.

(3) Case 130/75, judgment of 27 October 1976, Prais v Council [1976] ECR 1589 et seq. cf. in particular paragraph 16 of the Decision at p.1599.

(4) It is expressly provided with regard to the movement of workers (EEC Treaty, Art. 48 (2)), provision of services (EEC Treaty, Art. 65) and the movement of capital (EEC Treaty, Art. 67).

(5) Case 36/74, judgment of 12 December 1974, Walrave v Union Cycliste Internationale [1974] ECR 1405 et seq.

(6) "The rules (in the Treaty) regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. This interpretation ... is necessary to ensure the effective working of one of the fundamental principles of the Community", (Case 152/73, judgment of 12 February 1974, Sotgiu v Deutsche Bundespost, [1974] ECR 153 et seq.).

(7) Case 55/76, judgment of 22 January 1976, Balkan Import-Export v Hauptzollamt Berlin Packhof [1976] ECR 19 et seq.

(8) Series A, Vol. 6, p.34 in fine.

(9) Series A, Vol. 6., supra p.34

(10) Series A, Vol. 19, supra, p.20, para. 46.

(11) Series A, Vol. 22, judgment of 8 June 1976, p.31, para. 72.

(12) Case 41/74, judgment of 4 December 1974, Van Duyn v Home Office [1974] ECR 1337 et seq., in particular p.1350.

(13) Cf. W.J. Ganshof van der Meersch: La Convention européenne des droits de l'homme a-t-elle, dans le cadre du droit interne, une valeur d'ordre public? in Les droits de l'homme en droit interne et droit international, pp.155-251, pub. Presses universitaires de Bruxelles, 1968.

(14) Convention: Art. 8 (2), Art. 9 (2), Art. 10 (2) and Art. 11 (2).

(15) Case 8/55, judgment of 16 July 1956, Fédération Charbonnière de Belgique v High Authority of the ECSC, Rec. 1955 - 1956, p.199 et seq., in particular p.304. See also Case 8/56, judgment of 10 December 1957, A.L.M.A. v High Authority of the ECSC, Rec. 1957, p.179 et seq., in particular p.192; Case 25/70, judgment of 7 December 1970, Einfuhr- und Vorratsstelle für Getreide v Köster [1970] ECR 1161 et seq. in particular p.1174; Joined Cases 63 to 69/72, judgment of 13 November 1973, Werhahn v Council [1973] ECR 1229 et seq., in particular pp. 1250-1; Case 33/74, judgment of 3 December 1974, Van Binsbergen v Bedrijfsvereniging Metaalnijverheid [1974] ECR 1299 et seq., in particular pp.1309-1310. In his opinion in Case 11/70, Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide (judgment of 17 December 1970, [1970] ECR 1125 at p. 1147) Mr Advocate General Dutheillet de Lamothe defined the principle of proportionality as "the fundamental right ... that the individual should not have his freedom of action limited beyond the degree necessary for the general interest". In support of that principle he referred to Article 40 of the EEC Treaty from which it follows that the common organization of the agricultural markets may include only "those measures required to attain the objectives set out in Article 39".

(16) Case 15/57, judgment of 12 June 1958, Compagnie des Hauts Fourneaux de Chasse v High Authority of the ECSC Rec. 1958, p.161 et seq., in particular p.190.

(17) Case 5/73, judgment of 24 October 1973, Balkan-Import-Export v Hauptzollamt Berlin-Packhof [1973] ECR 1091 et seq. and Case 9/75, judgment of 24 October 1973, Schlüter v Hauptzollamt Lörrach [1973] ECR 1135 et seq.

(18) Series A, Vol. 6, p.34, para. 10; See also National Union of Belgian Police case, Series A, Vol. 19, supra, p.20, para. 46; Schmidt and Dahlström case, judgment of 6 February 1976, Series A, Vol. 21, p.18, para. 42; the Case of Engel and others, Series A, Vol. 22, supra, p.31, para. 72.

(19) Handyside case, Series A, Vol. 24, p.23, para. 49.

(20) Lawless case, judgment of 1 July 1961, Series A, Vol. 3, pp.57-59, paras. 36 to 38.

(21) Vienna Convention, Article 31.

(22) Case 11/70, Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle für Getreide, /1970/ ECR 1125 at p.1147

(23) Series A, Vol. 18, supra, p.17, para. 35.

(24) Series A, Vol. 24, supra, p.30, para. 63.

(25) Vide supra the references to the following cases: Case relating to certain aspects of the laws on the use of languages in education in Belgium; National Union of Belgian Police; Swedish Engine Drivers' Union; Schmidt and Dahlström; Engel and others; Handyside; Lawless.

(26) Series A, Vol.. 12, p.29, para. 50.

(27) Series A, p.31, para. 55.

(28) Series A, p.33, para. 60.

(29) Publication of the Court of Justice of the European Communities on the occasion of the Judicial and Academic Conference, 27-28 September 1976 (Luxembourg 1977). Vide also: L'Europe des Juges, R. Lecourt, then President of the Court of Justice (Brussels, 1976) in particular pp.234 to 247, 264, 267 to 271 and 272; W.J. Ganshof van der Meersch, L'ordre juridique des Communautés européennes et le droit international", a course given at the Academy for International Law (The Hague, 1975).

(30) These various methods of interpretations are discussed at pp. 15 to 42 in the report by Kutscher, op. cit. with references to the case-law of the Court of Justice.

(31) The Court of Human Rights for its part often has recourse to grammatical interpretation, that is to say interpretation on the basis of the structure of the provision to be interpreted. It sometimes expressly says so. Vide: Lawless case, judgment of 1 July 1961, Series A, Vol. 3, p.52, para. 14; Wemhoff case, judgment of 27 June 1968, Series A, Vol. 7, p.21, para. 4; Golder case, Series A, supra, pp.14 and 15, para. 32; Handyside case, Series A, Vol. 24, supra, p.29, para. 62.

(32) The Court of Human Rights clearly also has regard to the ordinary meaning of words. Vide in particular: Lawless case, Series A, Vol. 3, supra, pp.52 and 56, paras. 14 and 28; Case relating to certain aspects of the laws on the use of languages in education in Belgium, Series A, Vol. 6, supra, pp.32 and 35, paras. 6 and 11.

(33) The judgments where the Court in Strasbourg refers to the context are also numerous. Here again this is one of its standard methods. Vide in particular De Wilde, Ooms and Versyp (vagrancy), judgment of 18 June 1971, Series A, Vol. 12, pp. 41 to 42, para. 78; Golder, Series A, Vol. 18, supra, pp. 14, 17 and 18, paras. 31, 34 and 36; Engel and others, judgment of 8 June 1976, Series A, Vol. 22, p.41, para. 98; Kjeldsen, Busk Madsen and Pedersen, Series A, Vol. 23, pp.24 and 25, paras. 50 and 52.

(34) Case 25/70, judgment of 17 December 1970, Einfuhr- und Vorratsstelle Getreide v Köster /1970/ ECR 1161 at p.1174; Case 61/72, judgment of 13 March 1973, Maatschappij PPW v Hoofdproduktschap voor Akkerbouw-produkten /1973/ ECR 301, et seq. in particular p.310. In this case where the arguments centred around the various language versions of one provision the Court of Justice decided that "the meaning of the provisions in question must be determined with respect to their objective". Vide also Case 6/74, judgment of 21 November 1974, Moulijn v Commission /1974/ ECR 1287 et seq. in particular p.1293.

(35) Case 26/62, judgment of 5 February 1963, Van Gend en Loos v Nederlandse Administratie der Belastingen /1963/ ECR 1 et seq. in particular p.12; Vide also inter alia: Case 14/68, judgment of 13 February 1969, Wilhelm v Bundeskartellamt /1969/ ECR 1, at pp.13-14; Case 190/73, judgment of 30 October 1974, Officier van Justitie v Van Haaster /1974/ ECR 1123 et seq. in particular pp. 1132-1133.

(36) Case 26/62, Van Gend en Loos v Nederlandse Administratie der Belastingen /1963/ ECR 1 et seq.

(37) Case 6/64, judgment of 15 July 1964, Costa v ENEL /1964/ ECR 585 et seq.

(38) The object is "the direct and immediate effect of the measure"; the aim or the purposes are "the result of the legal effect produced by the measure" which is to be intepreted. Cf. C. Rousseau, Droit International Public (Paris 1970) I, no. 241, p.272.

(39) Les objectifs de la Communauté Européenne comme principes d'interpretation dans la jurisprudence de la Cour de Justice in Miscellanea Ganshof van der Meersch, II (Brussels-Paris, 1972), p.325 et seq. in particular p.327.

(40) Les principes d'interprétation suivis par la Cour de Justice des Communautés Européennes in Mélanges Rolin (Paris, 1964) p.217 et seq. in particular p.225.

(41) Kutscher, op. cit, p.31. Cf. also R. Bernhardt, Die Auslegung Völkerrechtlicher Verträge, (Cologne, 1963) p.143 et seq.

(42) As to the reference to the aim and the object of the Convention vide: Lawless case, Series A, Vol. 3, supra, p.42, para. 14; Case relating to certain aspects of the laws on the use of languages in education in Belgium, Series A, Vol. 6, supra, p.32, para. 5; Wemhoff case, Series A, Vol. 7, supra, p.23, para. 8; Neumeister case, judgment of 7 May 1974, Series A, Vol. 17, p.13, para. 30; Golder case, Series A, Vol. 18, supra, pp. 16, 17 and 18, paras. 34 and 36; case of Engel and others, Series A, Vol. 22, p.34, para. 81; Kjeldsen, Busk Madsen and Pedersen case, Series A, Vol. 23, p.27, para. 53.

(43) Statute of the Council of Europe, Article 3: "Every Member of the Council of Europe must ... collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter 1."

(44) Op. cit., p.5.

(45) Op. cit., p.15.

(46) This is not a reference to the case to case technique of interpretation. Certainly this technique is applicable in the context of evolutive interpretation but it is only a technique and a judge may have recourse to it in the context of other methods of interpretation, for example in the context of the grammatical method or the historical method. The evolution of the case law brought about by the evolution of the provision itself is here envisaged and not merely the evolution of the judge's conception of the provision which he is called upon to interpret.

(47) Les droits inscrits en 1950 dans la Convention européenne des droits de l'homme ont ils la même signification en 1975?, published by the Council of Europe (Strasbourg 1975) p.4.

(48) In support of this view Judge Sørensen cites the Advisory Opinion of the International Court of Justice in the case on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Order No. 1 of 26 January 1971, I.C.J. Reports 1971, p. 16 at p.31. The opinion is given with regard to an article of the United Nations Covenant but there is no reason for thinking that the observation is to be limited to that provision. The International Court moreover expressly states that in fine of that part of the Opinion:

"Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant - 'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned - were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.

(49) Thus: the right of association, racial equality, freedom of expression and its limits, the right of ownership and its limits, the protection of a person's private life, the protection of morals and health and, more generally, the concepts of the limits of fundamental rights provided for in Articles 8, 9, 10 and 11 of the Convention.

(50) Op. cit., p.6.

(51) International Court of Justice, judgment of 9 April 1949, I.C.J. Reports 1949, p.4 at p.24. Vide also the case of the German settlers in Poland, Permanent Court of International Justice reports 1923, Series B, No.6, p.25; the Advisory Opinion on Reparation for Injuries suffered in the service of the United Nations, I.C.J. Reports 1949, p.174 at pp.179-180.

(52) Case 8/55, judgment of 29 November 1956, Fédération Charbonnière de Belgique, supra at p.291 et seq.

(53) Case 20/59, judgment of 15 July 1960, Italian Republic v High Authority of the ECSC, Rec., 1960 p.663, in particular p.688.

(54) Case 25/59, judgment of 15 July 1960, Kingdom of the Netherlands v High Authority of the ECSC, Rec., 1960 p.723, in particular p.758.

(55) Joined Cases 7/56 and 3 to 7/57, judgment of 12 July 1957, Algera and others v Common Assembly of the ECSC, Rec. 1957, p.81, in particular p.118.

(56) Case 1/58, judgment of 4 February 1959, Friedrich Stork and Co. v High Authority of the ECSC, Rec., 1958-1959 p.43, in particular p.66.

(57) Case 2/74, judgment of 21 June 1974, Reyners v Belgium [1974] ECR 631, in particular p.655.

(58) Case 33/74, judgment of 3 December 1974, Van Binsbergen v Bedrijfsvereniging Metaalnijverheid [1974] ECR 1299 in particular pp.1309 and 1310.

(59) Case 41/74, judgment of 4 December 1974, Van Duyn v Home Office [1974] ECR 1337, in particular pp. 1348.

(60) Series A, Vol. 6, supra.

(61) P.31, para. 4.

(62) De Wilde, Ooms and Versyp case, Series A, Vol. 14, supra, p.9, para.16; Ringeisen case, judgment of 22 June 1972, Series A, Vol. 15, p.8, para. 21; Neumeister case, judgment of 7 May 1974, Series A, Vol. 17, p.14, para. 30; National Union of Belgian Police case, Series A, Vol. 19, supra, p.18, para. 38; Swedish Engine Drivers' Union case, judgment of 6 February 1976, Series A, Vol. 20, p.15, para. 39; Schmidt and Dahlström case, judgment of 6 February 1976, Series A, Vol. 21, p.15, para. 34.

(63) Case 30/59, judgment of 23 February 1961, De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the ECSC, Rec. 1961, p.1, in particular p.46. My underlining.

(64) Case 6/64, Costa v ENEL [1964] ECR 585 at p.594. Vide also Case 14/68, Wilhelm v Bundeskartellamt [1969] ECR 1 at pp. 14-15; Case 11/70, Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide [1970] ECR 1125 at p.1134; Case 48/71, judgment of 13 July 1972, Commission v Italy [1972] ECR 527 at p.532.

(65) Case 22/70, judgment of 31 March 1971, Commission v Council [1971] ECR 263 at pp. 275 and 276. (European Agreement concerning the work of crews of vehicles engaged in international road transport).

(66) Grands arrêts de la Cour de Justice des Communautés européennes (Paris, 1974), in particular p.106.

(67) Cited by C. Rousseau, Droit international public, I (Paris, 1970) No. 240, p.272.

(68) South-West Africa case, I.C.J. Reports 1966, p.50, No. 96.

(69) Series A, Vol. 6, judgment of 23 July 1968 (Merits), p.31, para. 3, supra.

(70) Series A, Vol. 18, judgment of 21 February 1975, p.18, para. 35. Cf. also in the same case with regard to the interpretation of Article 8, ibid. p.20, para. 43; Case on the laws on the use of languages in education in Belgium, with regard to the interpretation of Article 14 concerning the prohibition of discrimination; it is well known that the Court and the Commission consider Article 14 in conjunction with another article of the Convention as Article 14 only concerns "the rights and freedoms set forth in this Convention"; however the recent decided cases of the Commission and those of the Court support the theory of the autonomy of Article 14 (cf. M.-A. Eissen, L'autonomie de l'article 14 de la Convention européenne des droits de l'homme dans la jurisprudence de la Commission in Mélanges Modinos (Paris, 1968) p.122 et seq); this question concerned the interpretation of Article 14 in conjunction with Article 8 of the Convention and Article 2 of the additional Protocol (Series A, Vol. 6, pp.33-34, para.9).

(71) EEC Treaty, Art. 183.

(72) EEC Treaty, Art. 177.

(73) EEC Treaty, Art. 169 and Art. 171.

(74) EEC Treaty, Art. 164.

(75) Case on the laws on the use of languages in education in Belgium, judgment of 23 July 1968, Series A, Vol. 6, pp. 34 and 35, para. 10.

(76) Handyside case, judgment of 7 December 1976, Series A, Vol. 24, p.22, para. 48.

(77) Cf. De Wilde, Ooms and Versyp case (vagrancy), judgment of 18 June 1971, Series A, Vol. 12, p.45, para. 93 (derogations from respect for private and family life, home and correspondence, Art. 8 (2)); Golder case, judgment of 21 February 1975, Series A, Vol. 18, p.22, para. 45 (the same provision); case of Engel and others, judgment of 8 June 1976, Series A, Vol. 22, p.25, para. 59 (relating to the organization of the system of military discipline, Art. 5 (1), p.31, para. 72 (inequalities of treatment with regard to military service, Art. 5(1) in conjunction with Art. 14) and pp.41-42, para. 100 (derogations from the freedom of expression and the freedom to receive and impart information during military service, Art. 10(2). In each of these judgments the Court ruled that the Convention "allows the competent national authority a considerable margin of appreciation" (Engel case). In the Handyside case which concerned restrictions on the freedom of expression (Art. 10(2)) the Court stated that the Convention gives a margin of appreciation "both to the domestic legislator and to the bodies, judicial amongst others, that are called upon to interpret the laws in force" (Series A, Vol. 24, supra, p.22, para. 48).

(78) This proposal was made by the Court in its opinion of 4 September 1974 on the draft Short and medium-term programme of the Council of Europe in the general field of human rights Eur. Court H.R. (74) 30).

(79) Case 29/69, judgment of 12 November 1969, Stauder v Ulm [1969] ECR 419 at p.425.

(80) Case 25/70, judgment of 17 September 1970, Einfuhr- und Vorratsstelle v Köster [1970] ECR 1161 at p.1174; Case 11/70, judgment of 17 December 1970, Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide [1970] ECR 1125 at p. 1134; Case 4/73, judgment of 14 May 1974, Nold v Commission [1974] ECR 491 at p.507.

(81) Case 4/73, Nold supra; Case 36/75, judgment of 28 October 1975, Rutili v Minister of the Interior [1975] ECR 1219 at pp.1230-1232; Cf. also Case 130/75, judgment of 27 October 1976, Prais v Council [1976] ECR 1589 at pp.1597-1598.

(82) and (83) Case 36/75, Rutili, supra.

(84) Handyside case, Series A, Vol. 24, supra, p.25, para. 49.

(85) Ganshof van der Meersch op. cit, Course at the Academy of International Law of The Hague, 1975.

(86) Doc. E. 17.044 - 06.3.

Paper by Mr Fawcett, President of the Commission of Human Rights

I want to express first our gratitude to the European Court of Justice for inviting us to take part in this discussion, because I believe that such discussions can only be fruitful in finding ways of improving the effectiveness of the Convention, possibly without drastic amendments which we know can cause difficulties. The consultation that has taken place on some matters between the Commission and the Court of Human Rights has already been both informal and effective, for example, on the question of the presence or participation of an applicant or his representative in the proceedings of the Court of Human Rights, and in his helpful paper Judge Ganshof Van Der Meersch referred to this point.

I take this to be an open discussion and so my colleagues who are here will certainly be expressing their views too on the various issues that arise. But I would like to offer some remarks which I hope are of some common interest to the three bodies which are represented here. I start with certain assumptions. My first is that the present discussion is not directed to possible basic changes in the structure of the Convention, though amendments might come to be suggested at some points; but I understand from the two very helpful and thoughtful interventions we have so far had, that the general structure of the Convention, as it now is, is assumed to be the base of the present discussion. I would like to add there that that does not mean I do not think the Convention is in great need of revision, but that is a very different matter.

My second assumption is that the Declaration of the Communities in April, which we have before us, does not, in the words of Judge Sørensen, make a formal incorporation of the Convention into Community law.

My third assumption is a very different one. It is that at least some of our countries have entered a period of greater social tension, both political and economic, than was present in the first ten or fifteen years of the life of the Convention; and I think that

this may impose strains on the Convention which we have not yet experienced.

I believe that the effective application of the Convention at present, and I stress at present, depends in great part on two related factors - publicity and governmental image; and by government here I include parliament, the courts, and the administration. There is indeed a kind of principle that law and practice must conform with the Convention and must be seen to conform with the Convention. This guides the national responses to the interpretations of the Convention that are put forward by the competent bodies. If we are now to try to see how in the relation of the work of our three institutions progress can perhaps be made, it may be helpful to glance at some of the potentialities and limitations of the three institutions in the implementation of the Convention.

Take first the Commission. It has of course very wide opportunities for interpreting and applying the Convention. It has now had over 8 000 applications since its work began and is as familiar to you all but a very great majority of those have been rejected, that is to say, they have been declared inadmissible. If one compares those statistics with the experience of ombudsmen or parliamentary commissions or civil rights commissions in the United States - the relation between applications in a more or less free system of application, that is, where there is no strong filtering process - the figures are rather the same for what gets rejected, let us say, out of hand and what is taken up for more thorough investigation. Further, the fact that a very large proportion of the applications to the Commission are declared inadmissible does not mean that there is no effect from those applications. In fact you would have to increase the percentage rather considerably in order to determine what applications had had some effect. I do not want to take any time on this, but there could be examples given of applications declared inadmissible where, in the process of arriving at this conclusion, the government has decided to make some change in its administration. So, the opportunities of the Commission under the Convention are wide.

A second feature of the Commission's work is that its interpretation of the Convention is decisive at the stage of admissibility. This means that the great mass of applications to the Commission do involve and lead to interpretations of the Convention, of which there are now many volumes,

and those interpretations, right or wrong, are decisive as far as the Convention goes because the applications - where you have a declaration of inadmissibility or where you have admissibility and settlement - do not go beyond the Commission.

I think the limitations of the Commission are very clear. It may only give an opinion; its conclusion as to the application of the Convention in an admitted case is not decisive, it is an opinion, and if there is no settlement of the case it has no further competence, the matter going to the Committee of Ministers or, in certain cases, to the Court of Human Rights.

A second limitation is the fact that the proceedings of the Convention are confidential. Now, it is quite true that the decisions on admissibility are published, but, of course, they are not easily available. The confidentiality of the proceedings has of course its advantages, but it does have from the point of view of the publicity which I mentioned as an important factor in the implementation of the Convention, a marked disadvantage.

If I may come now to the Court of Human Rights, it is clear that its proceedings are public, and that its decisions are not only public but widely publicized. This is illustrated by the clear impact that decisions of the European Court of Human Rights have been having in recent years. That is a very important element, and does suggest that it would be good to widen, if possible, the work of the Court of Human Rights.

A second function it has, of course, is that of authoritative interpretation of the Convention. I think it is not disputed that the authoritative interpretation of the Convention, as far as the Convention organs go, lies with the Court of Human Rights. There are, however, limitations. First, the Court has relatively few opportunities

to interpret and apply the Convention. This arises for a number of reasons and it has been a matter of concern, I think, to the Commission and the Court. But under the present structure of the Convention it may be difficult to reverse this very effectively. A second limitation is that the decisions of the Court do not have direct effect in internal law and there may be a question as to how far the Court of Human Rights can make orders. Article 50 as those familiar with it know is not an entirely easy article to interpret; and if we may look at Article 54, which brings the judgments of the Court back to ultimate implementation by the Committee of Ministers, we see that there can be a limitation. It may be noted that the Commission is still getting applications raising this same issue as that which arose in the Golder Case, decided by the Court.

If I may venture now to speak of the European Court of Justice, it seems to me that it has certain important potentialities as far as our Convention goes. Its hearings are, of course, public. Very importantly its judgments are effective in the internal law. It is able more rapidly to dispose of cases that come before it than the Convention organs, and indeed the length of proceedings under the Convention is a matter of great concern to us all. The Commission has made efforts, which I think are bearing some fruit, to improve its procedures in this respect. But I think the rapid disposal of cases is a very important aspect of the implementation of the Convention and that would seem to me to lie within the power of the European Court of Justice. There are, of course, limits that are often mentioned of the content and scope of the Rome Treaty. This is described sometimes as being about economics, but even a casual reading of the Rome Treaty would show that there may be issues which do overlap or raise claims and issues under the Convention. Judge Sørensen has very persuasively shown some of the possibilities that lie there. Having looked at these potentialities and limitations of our three institutions, and assuming that the present structure and competences will be broadly the same, we may ask what possible ways ahead there are.

First, I would suggest a change of practice, which concerns primarily the Commission and the Court, but could touch perhaps on the work of the European Court of Justice, and that is to see whether it would not be possible to refer what we may call justiciable cases more quickly to the Court of Human Rights. The familiar distinction between justiciable and non-justiciable, though like most familiar distinctions it is very difficult to define, is perhaps helpful here and I would say that issues under Articles 5 and 6 of the Convention, that is to say the problems of detention and of fair trial, are essentially justiciable and, if a way could be found to accelerate references of substantial applications under those articles to the Court, there could be a great advance in the implementation of the Convention.

As a second suggestion I think it might be helpful to discuss the possibility of State participation in proceedings before the Court by Contracting Parties to the Convention which are interested in a particular case. This is possible in the European Court of Justice. As at least one of the objects of the Convention must be the establishment and securing of common standards, there are issues that come to the Court of Human Rights in which it could be most helpful if the views of governments not directly involved could be given to the Court.

The third question which has been, of course, already considerably discussed in various contexts is that of preliminary rulings by the Court of Human Rights on the interpretation and application of the Convention. I would not attempt here to go into this at any depth. There are a number of questions that the idea poses. For example, would the ruling be declaratory as it were of the meaning and purpose of the Convention; would it be in the nature perhaps of an advisory opinion? If so, how far can that be arrived at without some consideration of the facts of the particular case? I know the courts of some countries are very reluctant to make declaratory judgments. We know that the Second Protocol on advisory opinions by the Court of Human Rights is perhaps too narrowly drafted to be effective. I have not been able, myself,

to devise a question that could be put under the Protocol, but that may be the base of further developments.

Other questions of course are whether the ruling is advisory or whether it is binding in law as far as the issues go, and who could ask for the ruling? The national courts, the Commission or the European Court of Justice itself?

As far as national courts go there is the familiar analogy of Article 177 and Judge Sørensen has raised the question whether there might be some overlap between that and the possible application to the Commission. There is the further point, which has been discussed in the Commission very slightly but has not required in fact any decision, is whether the judgments of the European Court of Justice are a domestic remedy under Article 26 of the Convention? This raises the very interesting question of whether the European Court of Justice is an international court or a transnational court or in some ways a domestic court? And I think we may have at some time, in the Commission at least, to consider that question.

Mr President, I have tried to offer some points which, I think, can I hope be discussed and I thank you once more for allowing me to speak.

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